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Editor

Captain John B. Jones, Jr.

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DEPARTMENT OF THE ARMY
OFFICE OF THE JUDGE ADVOCATE GENERAL
WASHINGTON, DC 20310-2200



REPLY TO
ATTENTION OF

DAJA-SC (27-1)

4 June 1993

MEMORANDUM FOR STAFF AND COMMAND JUDGE ADVOCATES

SUBJECT: Supervision of Nonlawyer Assistants

1. As the Judge Advocate General's Corps downsizes, we will have to make greater use of our military and civilian nonlawyer assistants if we are to meet the demands for legal services.

2. Generally, a lawyer may delegate to a nonlawyer assistant any task normally performed by the lawyer except those tasks proscribed to one not licensed as a lawyer by statute, court rule, administrative rule or regulation, the Rules of Professional Conduct, or other controlling authority. Such delegation is subject to conditions:

a. The nonlawyer's activities must be done under the supervision of a lawyer who takes responsibility for the work;

b. The nonlawyer's status must be apparent to the client; and

c. Activities calling for the professional judgment of a lawyer, such as that required to provide a legal opinion or legal advice to a client or legal representation to a client at a hearing or deposition, must be performed by a lawyer.

3. Contact with clients, such as serving as liaison between attorneys and clients and conducting client interviews, is permitted. Other permissible activities include gathering facts, interviewing witnesses, and drafting documents. The training and experience of nonlawyer assistants are essential factors governing their use.

4. A supervising lawyer is responsible for all of the professional actions of a nonlawyer assistant performing legal services at the lawyer's direction and should take reasonable measures to ensure that the nonlawyer's conduct is consistent with AR 27-26, Rules of Professional Conduct for Lawyers. To this end, supervising lawyers must be thoroughly familiar with Rule 5.3, Responsibilities of Nonlawyer Assistants, and Rule 5.5, Unauthorized Practice of Law. Supervising lawyers must take reasonable measures to ensure all client confidences are preserved and to prevent conflicts of interest resulting from a nonlawyer's other responsibilities or interests.

5. I strongly encourage all supervising attorneys in the Judge Advocate Legal Service to make maximum use of our outstanding nonlawyer assistants, and to do so in accord with the high professional standards which are our hallmark.


JOHN L. FUGH
Major General, USA
The Judge Advocate General

Rules of Engagement: A Primer

Lieutenant-Commander Guy R. Phillips
Canadian Forces

At the evening update, the [Commander in Chief, General H. Norman Schwarzkopf] was briefed on an incident in which an Iraqi MiG-25 crossed the Saudi border some six to ten miles. Our aircraft in response were locked on and prepared to fire when the MiG-25 turned and flew back across the border. The CINC reminded the operations officer that we did not want to start the war over a single aircraft and that we carefully should review our rules of engagement.¹

I. Introduction

With the Coalition's success in the Persian Gulf War during the winter of 1990 and spring of 1991, the importance and role of rules of engagement (ROE) have received greater attention. In 1983, Captain Ashley Roach, United States Navy, wrote his definitive article on ROE and remarked:

There is a very real need for greater knowledge of Rules of Engagement on the part of strategy and policy personnel, tacticians and operators, and even by our civilian leaders. At present these rules are rarely, if ever, exercised and too few planners and commanders seek contingent approval for additional or relaxed rules.²

Accordingly, while a few key articles have been written on the topic, no comprehensive, up-to-date primer on ROE exists. The issues to be considered cover the following: what ROE are, what they purport to do, what influences them, and how they are implemented. The obvious concern for commanders, however, is how their forces can achieve the necessary middle ground between the U.S.S. *Stark* (FFG-31)³ and the U.S.S. *Vincennes* (CG-49)⁴ incidents. Not firing in self-defense—

and suffering casualties as a result—is as unsatisfactory as either firing too soon—and potentially escalating a crisis—or firing at an innocent target.

These concerns are weighty enough without adding the complexities of coalition force interaction. This mode of warfighting appears to be more likely for future international armed conflicts.⁵ During the Persian Gulf War, an augmented squadron of Canadian Forces (CF) CF-18 aircraft were integrated fully into the United States Combat Air Patrol's (CAP) schedule over the Persian Gulf. These aircraft protected Canadian, United States, and other coalition ships that were conducting the maritime interdiction operations in enforcement of the United Nations (U.N.) embargo against Iraq. Later, during Operation Desert Storm, the Canadian pilots flew in support of actual allied combatant operations.⁶ The CF-18 pilots' ROE had to recognize two lines of control. First, was the Canadian government's authority over the strategic employment of CF units and their involvements in the region. The second was the tactical control that United States commanders exercised through the daily Air Tasking Orders (ATO) and by the Airborne Warning and Control System Boeing E-3B/C Sentry (AWACS) aircraft or Aegis class cruisers controlling their CAP or sweep escort missions. Initially, the pilots' immediate concern was understanding the circumstances under which they could fire to protect themselves, or others, without unreasonable fear that they inadvertently would start the hostilities.

Rules of engagement regulate the use of force—either through the granting of permission to fire or by restricting the ability to employ the unit's weapons. Obviously, such specifications, definitions of hostile intent, descriptions of the permitted responses to particular threats or indications, and other factors regarding the use of force would be of great value to an adversary. Knowing the exact circumstances under which an opposing force will resort to the use of deadly force would

¹H. NORMAN SCHWARZKOPF & PETRE, *IT DOESN'T TAKE A HERO* 372 (1992).

²J. Ashley Roach, *Rules of Engagement*, *NAVAL WAR C. REV.*, Jan.-Feb. 1983, at 46, 46.

³For a description of the events surrounding the Iraqi Exocet missile strike on the U.S.S. *Stark* on 17 May 1987, see Michael Vlahos, *The Stark Report*, *PROCEEDINGS*, May 1988, at 63.

⁴Much has been written on the shootdown of the Iran Air Airbus, Flight 655, by the U.S.S. *Vincennes* on 3 July 1988. See Norman Friedman, *The Vincennes Incident*, *PROCEEDINGS*, May 1989, at 72; WILL ROGERS & SHARON ROGERS, *STORM CENTER: THE USS VINCENNES AND IRAN AIR FLIGHT 655* (1992); I.C.A.O., *Resolution and Report Concerning The Destruction of Iran Air Airbus on July 3, 1988*, 28 *I.L.M.*, 896 (1989); John Barry & Roger Charles, *Sea of Lies*, *NEWSWEEK*, July 13, 1992, at 29.

⁵Waldo D. Freeman et al., *The Challenges of Combined Operations*, *MIL. REV.*, Nov. 1992, at 2, 4, 11.

⁶These combat operations included both sweep escort missions and battlefield air interdiction. On 30 January 1992, a flight of two CF-18s engaged an Iraqi Exocet-armed TNC-45 patrol boat with both an AIM-7 Sparrow air-to-air missile and 20mm cannon fire. The vessel was disabled sufficiently to enable a United States Navy A-6 Intruder to sink it. See *DESERT CATS: THE CANADIAN FIGHTER SQUADRON IN THE GULF WAR* 32-33 (David Deere ed., 1991); *GULF AIR WAR DEBRIEF* 115 (Stan Morse ed., 1991).

aid an adversary in planning a devastating preemptive attack. Additionally, the ROE likely discloses the level of intelligence regarding an adversary's forces, capabilities, tactics, and expected threats or actions and may reveal classified technology for determining enemy identities or threats.⁷ Consequently, much of the actual ROE material is classified. Nonetheless, much can be discussed about ROE because the analytical framework for ROE is not classified, nor should it be. Military lawyers—as well as operational officers—require a conceptual basis from which to consider a particular set of ROE or to assist in their drafting. Such a review must ensure that the scope of the ROE are complete and that they are not limited unnecessarily because of a failure to allow all permissible uses of force.

This article sets out a framework for analyzing ROE. Additionally, it will consider how ROE beneficially regulate the use of force in both peace and war. The thesis is that ROE are necessary adjuncts to military operations, that formulating ROE requires particular expertise, and that enforcing ROE can be achieved only through a cooperative effort by both the operational legal advisor and the actual war-fighter.

II. Rules of Engagement

A. Definitions

William Prescott's famous invocation at Bunker Hill on 17 June 1775—"Don't one of you fire until you see the whites of their eyes"—is a classic instance of ROE.⁸ Other early examples undoubtedly exist, but the late Professor O'Connell claims that the term "rules of engagement" originated in Malta in the 1960s.⁹ While O'Connell does not elaborate on its derivation, he does offer an early twentieth-century example of the sort of latitude given to the Captains of Royal Navy

ships that can be construed as an early form of ROE.¹⁰ By virtue of the nature of their operations, naval commanders always have had the most independence from superiors' directions over their actions.

Even during earlier periods, however, traditions dictated that naval commanders had to be responsive to the political will. A lack of communications technology prevented the implementation of a more strict set of operational limitations and restricted the ability to revise the instructions if conditions warranted. With the "Nelson touch" tight rules of engagement [would] inhibit a commander on the spot from taking the requisite initiatives to achieve the objectives of his orders.¹¹ This approach provides the politician with the opportunity to blame the commander if things go awry.¹² Rules of engagement, therefore, afford an excellent means by which the National Command Authority (NCA) and operational commanders endeavor to exercise control over the use of force in a crisis or to manage a conflict.¹³

According to one of the principle commentators on ROE—Colonel Hays Parks, United States Marine Corps—ROE in the United States in 1979 "were in a state of disorganization only slightly short of anarchy."¹⁴ The Chief of Naval Operations, Admiral Thomas B. Hayward, was responsible for standardizing the peacetime rules of engagement (PROE)—particularly in the maritime arena—even though these rules did not represent the views of any single service.¹⁵ Rather, "they were a clear statement of national views on self-defense in peacetime that also could smooth the transition to hostilities and, for that matter, might be used in many stages of a belligerency."¹⁶ These ROE accomplished this objective by compiling all the references and including a "list of supplemental measures from which a force commander could select when he felt it necessary to clarify force authority beyond basic self-defense statements."¹⁷

⁷ See *infra* text accompanying note 214.

⁸ JOHN BARTLETT, FAMILIAR QUOTATIONS 368 (Emily M. Beck ed., 50th & 125th anniv. ed. 1980). The phrase also is attributed to Israel Putnam 1718-1790. *Id.* Prince Charles of Prussia said at Jagerndorf on 23 May 1745, "Silent till you see the whites of their eyes." *Id.* Frederick the Great directed his troops at Prague on 6 May 1757, "By push of bayonets, no firing till you see the whites of their eyes." *Id.* at 358.

⁹ O'CONNELL, THE INFLUENCE OF LAW ON SEA POWER 169 (1975).

¹⁰ In 1918, a British squadron of cruisers and a flotilla of destroyers were dispatched to the Baltic "to show the British flag and support British policy as circumstances dictate." These directions were expanded by the following: "A Bolshevik man-of-war operating off the coast of the Baltic Provinces must be assumed to be doing so with hostile intent and should be treated accordingly." *Id.* at 170.

¹¹ *Id.* at 179.

¹² *Id.* For Admiral "Sandy" Woodward's description of how he was prepared to take the blame for ordering the sinking of the Argentine cruiser *Belgrano* in April 1982, see WOODWARD, ONE HUNDRED DAYS: THE MEMOIRS OF THE FALKLANDS BATTLE GROUP COMMANDER 155 (1992).

¹³ J. Ashley Roach, United States Naval War College Elective, "Rules of Engagement" 211 SE 1 (1988-1989).

¹⁴ W. Hays Parks, *Righting the Rules of Engagement*, PROCEEDINGS, May 1989, at 83, 84.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

The controlling definition of ROE for the United States Armed Services is that of the Joint Chiefs of Staff (JCS), which states, "Directives that a government may establish to delineate the circumstances and limitations under which its own naval, ground, and air forces will initiate and/or continue combat engagement with enemy forces."¹⁸ The United States Army uses two definitions. The first—which is similar to the JCS definition—reads, "Directives issued by competent military authority that specify the circumstances and limitations under which forces will initiate and/or continue combat engagement with other forces encountered."¹⁹ The second definition creates an ambiguity for interpreting the first definition, "In air defense, directives that delineate the circumstances under which weapons can fire at an aircraft. The right of self-defense is always preserved."²⁰ This definition implies that ROE may deny self-defense to all forces other than those engaged in air defense.²¹

One of the most important circumstances in which force can be applied occurs when the inherent right of self-defense arises. This most likely will occur in two situations. Rules of engagement normally will prescribe that a unit or individual may act to defend either the unit, or the nation to which the individual or unit owes allegiance. Unit self-defense has been defined as follows:

The act of defending a particular unit of U.S. forces, or an element thereof, against a hostile act or manifestation of hostile intent. The need to exercise unit self-defense may arise in situations ranging from apparently unrelated, localized violence, to terrorist acts, low-level conflicts and prolonged engagements.²²

National self-defense, in the United States, is defined as follows:

The act of defending the U.S., U.S. forces, and, in certain circumstances, U.S. citizens, their property, or U.S. commercial assets from a hostile act or hostile intent. The need to exercise national self-defense may arise in isolated or prolonged regional or global situations that are often related to international instability.²³

Rules of engagement employ other definitions, including classified enunciations of items such as "hostile acts" and "hostile intent."

B. Analytical Structure of ROE

Each of the seminal articles in the area of ROE is emphatic that—whatever they may be—ROE are part of the political process by which armed forces are subordinate to the political will.²⁴ Equally emphatic is the requirement that—unless otherwise justified by very clear reasons—ROE must not be more restrictive than the law permits.²⁵

Rules of engagement address more than political and legal concerns. Captain Roach illustrated this in his 1983 article with two Venn diagrams.²⁶ The first shows that ROE are a smaller and totally contained subset of the larger set of actions permitted under the law of armed conflict. These laws encompass all the domestic and international law affecting military operations involving the potential use of force.²⁷ He also identified four other influences on ROE: law, operations, diplomacy, and policy.²⁸ With the second Venn diagram, he demonstrated how ROE are actually an interaction of these four factors.²⁹

¹⁸JOINT CHIEFS OF STAFF, PUBLICATION 1, DEPARTMENT OF DEFENSE DICTIONARY OF MILITARY AND ASSOCIATED TERMS 298 [hereinafter JCS PUB. 1].

¹⁹DEPT OF ARMY, FIELD MANUAL 101-5-1, OPERATIONAL TERMS AND SYMBOLS, 1-63, definition 1 (21 Oct. 1985) [hereinafter FM 101-5-1].

²⁰*Id.* definition 2.

²¹Charles S. Bloodworth, Rules of Engagement: The Second C of C³I, (n.d.) (unpublished manuscript, on file at International Law Division, The Judge Advocate General's School, U.S. Army).

²²SECRET Memorandum, Joint Chiefs of Staff, subject: Peacetime Rules of Engagement (PROE), I-3 (7 July 1986); quoted in, CENTER FOR L. AND MIL. OPERATIONS & INT'L. L. DIV., THE JUDGE ADVOCATE GENERAL'S SCHOOL, U.S. ARMY, OPERATIONAL LAW HANDBOOK (JA422) H-89 (draft 2d ed. 1992) [hereinafter OP. LAW HANDBOOK].

²³*Id.*

²⁴See O'CONNELL, *supra* note 9; Roach, *supra* note 2, at 46; George Bunn, *International Law and the Use of Force in Peacetime: Do U.S. Ships Have to Take the First Hit?*, NAVAL WAR C. REV., May-June 1986, at 69.

²⁵See, e.g., Roach, *supra* note 2, at 46.

²⁶*Id.* at 47-48.

²⁷*Id.* at 47.

²⁸*Id.* at 46.

²⁹The circles would not be the same size, nor would the overlap appear symmetrical, "since the relative influence of these four factors will vary depending on the circumstances." *Id.*

Based on the word "diplomacy" used in the broad sense of the "management of international relations,"³⁰ diplomatic factors affecting ROE are either of a political nature—as in serving particular political objectives—or they are international legal obligations created either by treaty or customary international law. The best example of the latter is the law of neutrality. One of the prime purposes of ROE is to ensure that neutrals are not targeted inadvertently. Old-fashioned gunboat diplomacy, however, is an example of a diplomatic action involving the show of force that is essentially a political purpose.³¹

Therefore, regulating the use of force by various units or personnel of armed forces serves several purposes, ranging from legal constraints and political aims to military command objectives. Each factor serves a particular goal and likely will affect the nature of the restriction imposed.

1. Legal Purposes.—Rules of engagement are primary means of ensuring compliance with both international and domestic law. In peacetime, the rules emphasize the inherent right of self-defense as codified in the U.N. Charter.³² International law requires that any defensive use of force be based upon the principles of necessity and proportionality. The former entails either an armed attack or the threat of imminent attack.³³ The proportionality element "requires that the use of force be limited in intensity, duration, and magnitude to what is reasonably required to counter the attack or threat of attack."³⁴ In wartime, the legal restrictions that ROE impose will come largely from the law of war—that is, The Hague³⁵ and Geneva³⁶ Conventions of 1907 and 1949—as well as from strategic and tactical considerations.

While other orders and training also are used to achieve the goal of ensuring that the laws are obeyed—especially when the potential use of force is involved—specific direction often is necessary and desirable. Part III of this article will consider in detail the laws applicable to the use of force.

2. Political Purposes.—Because military forces in a democratic society must follow the instructions of the government that they serve, ROE facilitate the primary purpose of ensuring that national policy will be followed by those forces in both peace and war.³⁷ Even though he was referring to the naval world, Professor O'Connell noted that "staffs may not have the luxury of time to formulate a reasoned set of rules of engagement, and, in the absence of these, naval operations are likely to be too hesitant for want of certainty or too uncontrolled to be politically acceptable."³⁸

This political control is omnipotent and therefore can direct action that is more restrictive than legally required. Admiral Woodward noted that the "political requirements could result in our entering the [British Total Exclusion Zone around the Falkland Islands] with our hands tied behind our backs. I thought it all too possible that I was going to be told again, 'The enemy *must* fire the first shot.'"³⁹ The rationale behind this approach was "Great Britain wished to be seen as the wronged party, the peace loving victim who had been unfairly attacked and was now being attacked again."⁴⁰ As will be seen in Part III, Admiral Woodward was quite correct in insisting upon the right to fire first. Political decision-makers, however, understandably wanted to restrict the Royal Navy's application of force in the hopes of activating world opinion.

³⁰THE OXFORD DICTIONARY OF CURRENT ENGLISH 206 (R.E. Allen ed., 7th ed. 1984).

³¹O'Connell, in the Mahan tradition, discussed gunboat naval policy in his chapter on rules of engagement. He referred to it as "the despatch of naval units or fleets for the purposes of catalytic force without any very clear objectives in mind, and in the hope that the navy will do something to resolve the situation and nothing to aggravate it." O'CONNELL, *supra* note 9, at 170. Gunboat diplomacy has been defined as "the use of threat of limited naval force, in order to secure advantage, or to avert loss, either in furtherance of an international dispute or against foreign nationals within the territory or the jurisdiction of their own state." J. CABLE, GUNBOAT DIPLOMACY: POLITICAL APPLICATION OF LIMITED NAVAL FORCE 21 (1971), quoted in Samuel P. Menefee, *Gunboat Diplomacy in the Persian Gulf? An Alternative Evaluation of a Contemporary Naval Conflict*, 31 VA. J. INT'L L. 567, 567 (1991).

³²U.N. CHARTER art. 51.

³³Roach, *supra* note 2, at 50.

³⁴*Id.*

³⁵The primary Hague Conventions of 1907 for potential ROE purposes are: Hague Convention No. IV Respecting the Laws and Customs of War on Land and Annex thereto Embodying Regulations Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, T.S. No. 539; Hague Convention No. V Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, Oct. 18, 1907, 36 Stat. 2310, T.S. No. 540 [hereinafter Hague V]; Hague Convention No. VIII Relative to the Laying of Automatic Submarine Contact Mines, Oct. 18, 1907, 36 Stat. 2332, T.S. No. 541 [hereinafter Hague VIII]; Hague Convention IX Concerning Bombardment by Naval Forces in Time of War, Oct. 18, 1907, 36 Stat. 2351, T.S. No. 542 [hereinafter Hague IX].

³⁶The four Geneva Conventions of 1949 are Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

³⁷Roach, *supra* note 2, at 47.

³⁸O'CONNELL, *supra* note 9, at 169.

³⁹WOODWARD, *supra* note 12, at 108. If these were the rules under which he was obliged to operate, Admiral Woodward noted, "then the first shot must clearly arrive on board one of my less-valuable frigates—not too easy to arrange." *Id.*

⁴⁰*Id.*

Rules of engagement can provide guidance, or preapproved action, for use in controlling a crisis and they offer mechanisms to regulate the shift from peace to war. In wartime, these rules can control the fighting for political reasons. The operation of the rules is exemplified best with the imposition of restrictions on the United States A-6 and F-111 aircraft that conducted the 1986 bombing of terrorist targets in Libya. The political leadership did not want any Americans shot down to become prisoners of war; therefore, the aircraft were permitted only one pass over their targets.⁴¹

Even with modern communications technology, the highest levels of government—and even the military command structure—cannot guarantee instantaneous contact with a particular unit. Given the speed of modern weapons, a unit cannot expect a higher level to give permission to fire. No nation is expected to suffer a potentially crippling first hit before trying to act. Therefore, the political leadership must establish some direction on its expectations regarding the use of the nation's military resources. Additionally, the NCA may wish to reserve exclusively for its authorization the use of certain weapons that may be present at the unit or particular types of responses that are within the capability of the force.⁴²

3. *Military Purposes.*—Rules of engagement also serve to guide subordinate commanders in employing their forces. Rules of engagement are integral to a unit's deployment for operations. Other than humanitarian assistance operations in which little risk of violence exists, any deployment of military units must contemplate the use of force. While foreign missions are likely to be more hazardous, ROE will not be used exclusively for such operations. Therefore, domestic operations also may involve ROE.⁴³ While ROE should not be the actual mission statement, they should be crafted to clarify or help define the unit's mission. Any additional understanding of the mission should enhance the likelihood of the successful accomplishment of the objective. Consequently, those involved in preparing ROE must know the mission statement in the operation plan (OPLAN). If more than one mission statement exists, a corresponding number of ROE may have to be prepared.

The most important military aspect of ROE is establishing limits on the use of force. This applies both to the commander as well as to his or her personnel. The commander will be bound by the ROE as guidance on the application of the national policy applicable to the mission. While ROE mainly are restrictive to prevent overreaction, they also can prevent underreaction if the ROE specify permissible responses to expected actions by an adversary. Additionally, some operations involve threat and counter-threat activities; therefore, ROE will help maintain the balance by not "thrusting the apparent necessity of self-defense too obviously upon the opponent."⁴⁴ Rules of engagement also will protect the commander if clear directions on the use of force are given to the troops.⁴⁵

Rules of engagement also may help to characterize the nature of the mission. If a show of force is desired, then the ROE may be less constrained than they are during normal peacetime deployments. United States Navy freedom of navigation exercises provide examples of both restricted and liberal ROEs. On 4 January 1989, two F-14 Tomcat fighter aircraft from the U.S.S. *John F. Kennedy* (CV-67) were approached head-on by two Libyan MiG-23 Floggers in international waters off the Gulf of Sidra. As the MiGs exhibited hostile intent, the F-14s engaged them with air-to-air missiles and both MiGs were shot down.⁴⁶ This episode followed several Gulf of Sidra incidents involving aggressive and hostile acts between the United States Navy and Libyan forces.⁴⁷ This series of encounters probably helped to define "hostile intent" in the ROE.⁴⁸

By contrast, the ROE undoubtedly were restrictive for the United States Navy freedom of navigation exercise conducted by the U.S.S. *Caron* (DD-970) and the U.S.S. *Yorktown* (CG-48). On 12 February 1988, these two ships were involved in a bumping incident with two Soviet warships in the Union of Soviet Socialist Republic's territorial waters of the Black Sea.⁴⁹ Normally, one would expect that ROE will be designed to maintain a low threat profile for potential adversaries. In so doing, the ROE should prevent the opposition from being placed in a position of reacting in self-defense, as the two United States F-14s over the Gulf of Sidra were forced to do in January 1989.

⁴¹ Parks, *supra* note 14, at 90.

⁴² The use of riot control agents is limited by Exec. Order No. 11850, 40 Fed. Reg. 16,187 (1975).

⁴³ For the legal basis of using troops in civil disturbance operations, see 10 U.S.C. § 331—request from a state; 10 U.S.C. § 332—enforcement of federal law; 10 U.S.C. § 333—protection of civil rights. In Canada, such domestic operations are in "aid of the civil power." SEE NATIONAL DEFENCE ACT, S.C. ch. N-5, §§ 274-85 (1985).

⁴⁴ Roach, *supra* note 2, at 48; O'CONNELL, *supra* note 9, at 180.

⁴⁵ Directions to the troops may not necessarily be the actual ROE because ROE often are classified at a higher level than that of most soldiers or the ROE are contained in operations orders that are not disseminated to lower levels.

⁴⁶ See Ed Magnuson, *Chemical Reaction*, TIME, Jan. 16, 1989, at 14.

⁴⁷ An example of self-defense occurred on 19 August 1981, when two F-14s from the U.S.S. *Nimitz* (CVN-68) shot down two Libyan SU-22 Fitters about 60 nautical miles from the Libyan coast after one of the Fitters fired at them during a Sixth Fleet missile exercise. See Dennis R. Neutze, *The Gulf of Sidra Incident: A Legal Perspective*, PROCEEDINGS, Jan. 1982, at 26. For a more complete description of the many other incidents in the Gulf of Sidra, see W. Hays Parks, *Crossing the Line*, PROCEEDINGS, Nov. 1986, at 40.

⁴⁸ Colonel Parks claimed that the ROE for operations near Libya had been altered slightly following these incidents, but essentially followed the JCS PROE. Parks, *supra* note 14, at 84.

⁴⁹ See John W. Rolph, *Freedom of Navigation and the Black Sea Bumping Incident: How "Innocent" Must Innocent Passage Be?*, 135 MIL. L. REV. 137 (1992); William J. Aceves, *Diplomacy at Sea: U.S. Freedom of Navigation Operations in the Black Sea*, 46 NAVAL WAR C. REV., Spring 1993, at 59.

Rules of engagement should not be what the Navy would call "rudder orders"; in other words, they should not be specific directions for how a commander is to employ his or her unit.⁵⁰ Because commanders require the maximum discretion possible in directing their forces, ROE should offer military forces a standardized set of instructions that provide consistency of action among the services and units.

The highest levels of the United States executive branch twice have ignored the principle of affording commanders maximum discretion in directing their forces and instead have established ROE that directed which targets would be attacked, which weapons would be used, and the timings of the attacks. These cases exhibit the pitfalls of formulating ROE that are too inflexible and of not leaving a commander the discretion to decide how best to use his or her resources to accomplish the mission in accordance with the principles of war. The two cases referred to are the bombing of North Vietnam during Operation Rolling Thunder⁵¹, and the bombing of anti-aircraft artillery and missile sites in Lebanon on 4 December 1983. The latter incident furnishes a perfect example of the potential consequences of undue political involvement in military mission planning.

The U.S.S. *John F. Kennedy* (CV-67) and the U.S.S. *Independence* (CV-62) launched an air strike against Syrian anti-aircraft artillery and missile sites in Lebanon's Bekaa Valley on 4 December 1983. This attack was in retaliation for the bombing of the United States Marine Corps barracks in Beirut on 23 October 1983. The on-scene commanders planned to have the aircraft "go in" at midday so that the pilots would not be blinded by the rising morning sun. The planned crew

briefings and loading of the aircraft, therefore, were based on a late morning launch time. Rockeye cluster bombs were selected as the munition to be used because of the targets' dispersal and the inability to pick out individual targets for engagement with more precise munitions. When "higher authority" insisted on advancing the time of the attack to first light, the arming of the aircraft and crew briefing became chaotic. Eight aircraft ended up carrying inappropriate ordnance which could have been carried by one A-6 alone. One pilot was killed, another became a prisoner of war, and two aircraft were lost out of a strike force of eighteen.⁵² The orders directing the attack must have modified or suspended some of the ROE in force at the time, although nothing from the incident indicates that the ROE were responsible for the confused preparation for the attack.

Such a degree of political control over the execution of military missions has been condemned soundly.⁵³ Operation Desert Storm was not directed from above so intensely, which undoubtedly contributed to its resounding success for the coalition forces.⁵⁴

III. The Legal Use of Force

A. Use of Force Under International Law

1. *General Principles.*—Rules of engagement must be premised upon the principles of international and national law. Foremost among these rules are the restraints on the use of force under international law to which a commander must adhere.⁵⁵ Retorsion,⁵⁶ reprisals,⁵⁷ and intervention⁵⁸ are three

⁵⁰Roach, *supra* note 2, at 46.

⁵¹For a discussion of the ROE concerns, see Parks, *supra* note 14, at 83; W. Hays Parks, *Rules of Engagement: No More Vietnams*, PROCEEDINGS, Mar. 1991, at 27 [hereinafter *No More Vietnams*]; J. Terry Emerson, *Making War Without Will: Vietnam Rules of Engagement, in THE VIETNAM DEBATE; A FRESH LOOK AT THE ARGUMENTS* 161 (John Norton Moore ed., 1990); W. Hays Parks, *Rolling Thunder and the Law of War*, AIR U. REV., Jan.-Feb. 1982, at 2 [hereinafter *Rolling Thunder*]. *But see* Alfred P. Rubin, *Rolling Thunder Reconsidered*, AIR U. REV., May-June 1982, at 66; J.C. THOMPSON, *ROLLING THUNDER: UNDERSTANDING POLICY AND PROGRAM FAILURE* (1980).

⁵²WILSON, *SUPER CARRIER: AN INSIDE ACCOUNT OF LIFE ABOARD THE WORLD'S MOST POWERFUL SHIP, THE U.S.S. JOHN F. KENNEDY* 124-54 (1986).

⁵³See sources cited *supra* note 51.

⁵⁴See *No More Vietnams*, *supra* note 51; HARRY G. SUMMERS, JR., *ON STRATEGY II: A CRITICAL ANALYSIS OF THE GULF WAR* (1992).

⁵⁵Roach, *supra* note 2, at 49.

⁵⁶"Retorsion is a measure of self-help which, though unfriendly, is within the legal powers of the state employing it and is, therefore, necessarily a legal measure even if it involves the use of force in its application." BRIERLY, *THE LAW OF NATIONS: AN INTRODUCTION TO THE INTERNATIONAL LAW OF PEACE* 339 (Sir Humphrey Waldock ed., 6th ed. 1963). Therefore, the enforcement of a domestic policy against another state's vessels in one's territorial sea may amount to retorsion. The use of force then would be governed by domestic law.

⁵⁷Reprisal in peacetime "involves the seizing of property or persons by way of retaliation for a wrong previously done to the state taking reprisals." *Id.* at 399. Briery cites three types of reprisals taken before the League of Nations: "(a) embargo of the offending state's ships found in ports and territorial waters of the state that claimed to have been wronged; (b) seizure of its ships or property on the high seas; and (c) pacific blockade." *Id.* Briery also sets out the following three conditions for the legitimacy of a reprisal:

(a) there must have been an illegal act on the part of the other state; (b) they must be preceded by a request for redress of the wrong, for the necessity of resorting to force cannot be established if the possibility of obtaining redress by other means is not even explored; and (c) the measures adopted must not be excessive, in the sense of being out of all proportion to the provocation received.

Id. at 401.

The U.N. Charter precludes any armed reprisals in peacetime, but the legality of economic reprisals remains a matter of debate. BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 465 (3d ed. 1979).

⁵⁸Intervention is "often used quite generally to denote almost any act of interference by one state in the affairs of another; but in a more special sense it means dictatorial interference in the domestic or foreign affairs of another state which impairs that state's independence." BRIERLY, *supra* note 56, at 402; see also Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625 (XXV), U.N. GAOR, Supp. No. 21, at 121, U.N. Doc. A/8028 (1970); Definition of Aggression, G.A. Res. 3314 (XXIX), U.N. GAOR Supp. No. 31, at 142, U.N. Doc. A/9631 (1974), 69 A.J.I.L. 480 (1975); (discussed in VON GLAHN, *LAW AMONG NATIONS: AN INTRODUCTION TO PUBLIC INTERNATIONAL LAW* 677-78 (6th ed. 1992)).

of the four measures of "self-help" known under the classical system of the legal regulation of the use of force.⁵⁹ Self-defense, however, is the one use of force most applicable to ROE. Self-defense is not an absolute right to justify "self-preservation,"⁶⁰ but strictly is a limited right derived from the corollary of the right to independence.⁶¹ International law also requires a state to repress international crimes—such as piracy—and the use of force may be authorized in international crimes—even when not directly related to the immediate needs of self-defense or the protection of nationals.⁶²

Although war once was justified under *jus ad bellum*⁶³ as *bellum justum* or *bellum injustum*,⁶⁴ or was seen as the extension of politics,⁶⁵ the unilateral use of force against another state currently is regulated in international law.⁶⁶ One of the first efforts—the 1928 Pact of Paris (Kellogg-Briand Peace Pact)—condemned recourse to war for the "solution of international controversies, and renounce[d war] as an instrument of national policy."⁶⁷ Additionally, the efforts of Andrew Carnegie and the League of Nations sought to "impose the rule of law on use of force."⁶⁸

Following the devastation of the Second World War, the U.N. was created as a means of making war "both impossible and illegal—impossible, through a concert of great powers functioning as the Security Council; illegal, by condemning all use of force except that justified by the necessities of self-defense."⁶⁹

2. *United Nations Charter*.—The Charter provides, in Articles 2(3) and 2(4), the basic legal principles regarding the use of force:

3. All Members shall settle their international disputes by peaceful means in such manner that international peace and security, and justice, are not endangered.

4. All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.⁷⁰

The Security Council originally was envisioned—through either its status or its military enforcement mechanism⁷¹—to prevent armed conflict and promote the peaceful settlement of disputes.⁷² Even though the military enforcement regime of the Security Council never has eliminated the use of force as a state instrument,⁷³ states still endeavor to justify their actions in accordance with the U.N. precepts.⁷⁴ O'Connell notes that "if the law is ineffective the primordial right of self-defense must reassert itself."⁷⁵ A minority viewpoint further asserts that Article 2(4) was not binding in the absence of either "the effective establishment of collective institutions and methods"

⁵⁹BRIERLY, *supra* note 56, at 398.

⁶⁰Brierly noted "self-preservation in the case of a state as of an individual is not a legal right but an instinct; and even if it may often happen that the instinct prevails over the legal duty not to do violence to others, international law ought not to admit that it is lawful that it should do so." *Id.* at 405.

⁶¹*Id.* at 405; *see also*, O'CONNELL, 1 INTERNATIONAL LAW 338 (1965).

⁶²DEP'T NAVY, COMMANDER'S HANDBOOK OF THE LAW OF NAVAL OPERATIONS, NAVAL WARFARE PUBLICATION 9, at 3-6 to 3-7 (1987) [hereinafter NWP 9].

⁶³1 O'CONNELL, *supra* note 61, at 323 (stating notions of the "just war" were abandoned in the eighteenth century and the decision to go to war was placed beyond legal constraint).

⁶⁴BRIERLY, *supra* note 56, at 33, 397-98.

⁶⁵CARL VON CLAUSEWITZ, ON WAR 87 (Michael Howard & Peter Paret eds. & trans., 1976) ("war is not merely an act of policy but a true political instrument, a continuation of political intercourse, carried on with other means").

⁶⁶W. Michael Reisman, *Allocating Competences to Use Coercion in the Post-Cold War World: Practices, Conditions, and Prospects*, in LAW AND FORCE IN THE NEW INTERNATIONAL ORDER 26, 28 (Lori F. Damrosch & David J. Scheffer eds., 1991).

⁶⁷U.N. CHARTER art. I; BRIERLY, *supra* note 56, at 409 (noting that the Pact of Paris was signed outside the regime of the League of Nations, thereby surviving as valid law).

⁶⁸William D. Rogers, *The Principles of Force, The Force of Principles*, in RIGHT V. MIGHT: INTERNATIONAL LAW AND THE USE OF FORCE 95, 96 (Louis Henkin et al. eds., 1989).

⁶⁹*Id.* at 96.

⁷⁰U.N. CHARTER arts. 23, 27, 61.

⁷¹*Id.* arts. 39-49.

⁷²For a discussion on the Security Council's failure to prevent armed conflict and to promote the peaceful settlement of disputes, see David Turndorf, *The U.S. Raid on Libya: A Forceful Response*, 14 BROOK. J. INT'L L. 187, 202-05 (1988).

⁷³*See* Rogers, *supra* note 68, at 97-100 (listing recent examples of U.N. inability at preventing armed conflict).

⁷⁴George Bunn, *supra* note 24 at 71. *See generally* Louis Henkin, *supra* note 68, at 37; Rogers, *supra* note 68, at 95.

⁷⁵O'CONNELL, *supra* note 61, at 339.

or the "Security Council's effective enforcement of the Charter's provisions."⁷⁶ The International Court of Justice (I.C.J.) has held that Article 2(4) is now a customary rule of international law.⁷⁷

Article 2(4) is by no means clear or unambiguous.⁷⁸ Consequently, it occasionally has been interpreted to permit the use of force that actually derogates from its efforts to prohibit the resort to force.⁷⁹ These arguments—each of which has been refuted—are as follows: (1) force can be used to "vindicate or secure a legal right," such as to effect a right of passage through an international strait or secure compliance with a judicial or arbitral award; (2) force can be used to recover territory considered by the recovering state to be rightfully its own; and (3) force can be used to intervene for humanitarian assistance.⁸⁰ Schachter considers that humanitarian assistance may be legally acceptable if it is exercised to rescue or protect one's nationals who imminently are threatened in another state's territory.⁸¹ Intervention under these circumstances, however, arguably would be a legitimate use of force in self-defense. Nevertheless, rescue attempts must meet the following three-part test: (1) an immediate threat of injury must exist; (2) the host state is unwilling or unable to prevent harm to them; and (3) the actions taken must be confined solely to the rescue and not otherwise derogate from the territorial integrity or political independence of the state.⁸² The Entebbe rescue widely is considered the classic example of this right; the attempted Tehran hostages rescue and the rescue of United States medical students in Grenada, however, have been criticized.⁸³

If Article 2(4)—despite its ambiguities—is read to prohibit the use of force, the only entitlement to apply force against another state or its nationals rests with the right of self-defense under Article 51 because self-defense does not fall within any of the three proscriptions in Article 2(4).⁸⁴ Cer-

tainly, self-defense has been the common justification for the occasions when nations have resorted to the use of force. Article 51 provides as follows:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security. Measures taken by Members in exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.⁸⁵

Therefore, a state responding to a clear, unprovoked armed attack has the *inherent right of self-defense* (but only until the Security Council has taken the measures necessary to maintain international peace and security). The more difficult question is what is permitted in instances "not amounting to repulse of an armed attack."⁸⁶

3. *Self-Defense and Anticipatory Self-Defense.*—At issue is whether Article 51 of the U.N. Charter recognizes a full right of self-defense or whether it restricts that right.⁸⁷ Two schools of thought have arisen in this regard. The first, espouses a narrow position that restricts the use of force solely to responding to an armed attack by relying on the wording "if an armed attack occurs." Any threat or use of force not coming precisely within this wording would contravene Article 2(4).⁸⁸ The second approach takes a more expansive view.

⁷⁶R. St. J. MacDonald, *The Nicaragua Case: New Answers to Old Questions?*, CAN. Y.B. INT'L L. 127, 134-35 (1986).

⁷⁷Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14 June 27, at paras. 187-188.

⁷⁸For example, does the word "force" in Art. 2(4) include economic, political, and psychological actions along with the physical; is "indirect" force included; and what constitutes a "threat?" Oscar Schachter, *International Law: The Right of States to Use Armed Force*, 82 MICH. L. REV. 1620, 1624-25 (1984).

⁷⁹*Id.* at 1626.

⁸⁰*Id.* at 1625-29.

⁸¹*Id.* at 1629.

⁸²*Id.* at 1629-30.

⁸³The Tehran rescue attempt can be faulted because alternative peaceful solutions had not been exhausted and the rescue mission involved a high degree of danger. The Grenada action can be faulted for extending beyond the rescue mission. *Id.* at 1631-32.

⁸⁴MacDonald, *supra* note 76, at 144.

⁸⁵U.N. CHARTER arts. 23, 27, 61.

⁸⁶O'CONNELL, *supra* note 61, at 340.

⁸⁷Turndorf, *supra* note 72, at 212.

⁸⁸BRIERLY, *supra* note 56, at 417.

Because the article is silent on what constitutes the "inherent right of individual or collective self-defense," this allows the broad use of force in anticipation of an *imminent* armed attack.⁸⁹ The inclusion of the words "nothing . . . shall impair the inherent right," shows a clear intent not to restrict the pre-Charter rights.⁹⁰

The majority position supports this latter interpretation. Brierly examined both the preparatory material on the article and the wording of the other languages of the Charter and concluded that it is "not easy to presume an intention in the . . . words drastically to impair that right."⁹¹ States, he argued, are not required to await the potentially disastrous results of an attack before being able to respond, but may respond to preparatory acts as well.⁹² Professor Schachter notes that

states facing an imminent threat of an attack will take defensive measures irrespective of the law, but it is preferable to have states make that choice governed by necessity than to adopt a principle that would make it easier for a state to launch an attack on the pretext of anticipatory defense.⁹³

Accordingly, if the right of anticipatory self-defense is acknowledged, the next step is to determine what constitutes the inherent right of self-defense.

4. *The Caroline Case*.—When assessing the inherent or customary right of self-defense, every commentator refers to the classic statement from the *Caroline*⁹⁴ incident in 1837.⁹⁵ During the 1837 insurrection in Upper Canada (now the province of Ontario), a group of Canadian militia crossed into

New York State to prevent the transport of men and materials into Canada by the privately owned United States steamship *Caroline*, which had been operating from United States ports.⁹⁶ In an attack on the ship, two United States citizens were killed and the ship was destroyed by going over Niagara Falls.⁹⁷

The United States Secretary of State, John Forsyth, registered an immediate protest with Henry Fox, the British Minister in Washington, demanding redress for the destruction of property and the killing of Americans.⁹⁸ The British Minister responded that the action taken by the militia was justified "by the 'piratical character' of the *Caroline*, by the unwillingness or inability of the United States to enforce its neutrality laws along the Canada-United States border, and by the necessity of self-defense and self-preservation."⁹⁹ When Alexander McLeod—a British subject—subsequently was arrested in 1840, Henry Fox was the one protesting. He asserted that the attack on the *Caroline* was "a public act, taken in self-defense by persons acting under the authority of superior officers" and, therefore, the United States could not proceed against any individuals.¹⁰⁰ The Secretary of State replied that the matter was within the jurisdiction of New York State and not within the competence of the federal executive.¹⁰¹

Daniel Webster, who replaced Forsyth as Secretary of State, subsequently agreed with the British position—in respect of the arrest of McLeod—who subsequently was acquitted of all charges.¹⁰² Webster, however, disagreed strongly asserting that the action was justified on the basis of self-defense. Webster's reply has become the classic formulation of the right of self-defense. Self-defense must be judged by the circumstances of the case, and consequently, Britain had to show a

⁸⁹Schachter, *supra* note 78, at 1633.

⁹⁰BRIERLY, *supra* note 56, at 417.

⁹¹*Id.* at 419.

⁹²Schachter, *supra* note 78, at 1634; *see also*, O'CONNELL, *supra* note 61, at 343.

⁹³Schachter, *supra* note 78, at 1634.

⁹⁴For a complete discussion of this incident, see Martin A. Rogoff & Edward Collins, Jr., *The Caroline Incident and the Development of International Law*, 16 BROOK. J. INT'L L. 493 (1990).

⁹⁵*E.g.*, O'CONNELL, *supra* note 61, at 340; BRIERLY, *supra* note 56, at 405; Turndorf, *supra* note 72, at 213.

⁹⁶Rogoff & Collins, *supra* note 94, at 494-95.

⁹⁷*Id.* at 495.

⁹⁸A formal demand for reparations was deposited in London in May 1838 and Lord Palmerston, the British Foreign Secretary, "indicated a willingness to consider the matter." Nothing further, however, was concluded in this regard. *Id.* at 496-97.

⁹⁹H.R. Doc. No. 302, 25th Cong., 2d Sess. 3 (1838), *quoted in* Rogoff & Collins, *supra* note 94, at 497.

¹⁰⁰Rogoff & Collins, *supra* note 94, at 497.

¹⁰¹*Id.*

¹⁰²*Id.*

necessity of self-defense, instant, overwhelming, leaving no choice of means, and no moment for deliberation. It will be for it to [show], also, that the local authorities . . . did nothing unreasonable or excessive; since the act, justified by the necessity of self-defense, must be limited by that necessity, and kept clearly within it.¹⁰³

Subsequent debate centered on whether necessity existed and whether the response was disproportionate. Lord Ashburton subsequently agreed with Secretary Webster that the use of force was limited based on the right of self-defense.¹⁰⁴ This statement has been accepted since that time.¹⁰⁵

5. *Necessity and Proportionality.*—Necessity is the requirement that force be used in response to a hostile act or in situations in which the hostile intent is evident.¹⁰⁶ Necessity also must relate to the requirement to use force because other measures are unavailable.¹⁰⁷ Proportionality—as seen in the *Caroline* incident—is the requirement that the use of force be “in all circumstances limited in intensity, duration, and scope to that which is reasonably required to counter the attack or threat of attack and to ensure the continued safety of [its national interest].”¹⁰⁸ Proportionality between the attack and the opposing conduct need not exist because “The action needed to halt and repulse the attack may well have to assume dimensions disproportionate to those of the attack suffered.”¹⁰⁹ Rather, “the requirement of the proportionality of the action taken in self-defense . . . concerns the relationship

between the action and its purpose, namely . . . that of halting or repelling the attack . . .”¹¹⁰ Finally, measures taken in preparation for self-defense are not contrary to international law.¹¹¹

Peacetime rules of engagement will be concerned mostly with the immediate *in situ* “legitimate use of counter-force,” which is short of resorting to war.¹¹² The resort to force in self-defense must conform to these conditions of necessity, proportionality, and immediacy—each of which is best assessed by the local commander.¹¹³ Dicta exist that the necessity test should not be based on hindsight and that states should be granted a certain amount of latitude in “deciding the necessity of the measures taken.”¹¹⁴

6. *Collective Defense.*—The U.N. Charter does not define the rights of collective defense. While some commentators have suggested that the scope of collective defense is limited to cases of two states both being attacked, others have suggested that the rights apply whenever a state is attacked.¹¹⁵ Still others have claimed that it applies only when a sufficient proximity of geographical, economic, political, and cultural factors exist to justify the conclusion that an attack on one was an attack on the other.¹¹⁶ State practice supports this interpretation when a mutual defense pact exists between the parties.¹¹⁷ Collective self-defense also must remain within the requirements of necessity and proportionality to the threat.¹¹⁸

In *Nicaragua v. United States*,¹¹⁹ the I.C.J. added two new rules to the right of collective self-defense. The rules state,

¹⁰³ *Id.* at 497-98.

¹⁰⁴ Ashburton issued an apology for the violation of United States territory that Webster later accepted. *Id.* at 500.

¹⁰⁵ See *id.* at 501-10; BRIERLY, *supra* note 56, at 406-08; O'CONNELL, *supra* note 61, at 340.

¹⁰⁶ NWP 9, *supra* note 62, at 4-3, § 4.3.2.

¹⁰⁷ MacDonald, *supra* note 76, at 152.

¹⁰⁸ NWP 9, *supra* note 62, at 4-3.

¹⁰⁹ Military and Paramilitary Activities (Nicar. v. U.S.), *supra* note 77, at 212, (Schwebel J. dissenting), *quoted in*, MacDonald, *supra* note 76, at 153.

¹¹⁰ *Id.*

¹¹¹ MacDonald, *supra* note 76, at 144; see also BRIERLY, *supra* note 56, at 423-24 (regarding the legality of British warships transiting the Corfu Channel ready to resort to force from Albanian coastal batteries discussed by the I.C.J. in *The Corfu Channel* (Albania v. U.K.), 1949 I.C.J. 4).

¹¹² DINSTEIN, WAR, AGGRESSION AND SELF-DEFENCE 200 (1988).

¹¹³ *Id.* at 201-02.

¹¹⁴ MacDonald, *supra* note 76, at 152.

¹¹⁵ *Id.* at 146.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*; see also DINSTEIN, *supra* note 112, at 250 (adding immediacy to the requirements for collective self-defense).

¹¹⁹ Military and Paramilitary Activities (Nicar. v. U.S.), *supra* note 77.

"there must be a declaration by the victim that it is subject to armed attack" and that "the victim requested assistance from the state exercising the right of collective self-defense."¹²⁰ These requirements will complicate the ability of a coalition unit to act in self-defense of another nation's troops, who alone are subject to attack. The burden imposed by these requirements, however, can be overcome by effective communications among the nations involved in the coalition.

B. Law of War Issues

If the act of self-defense has complied with the requirements of necessity and proportionality, the use of force almost axiomatically will not have infringed any other legal norms. By following these requirements, the counter-force applied will be against only the attacking forces and the imminent threat. This obviates any concerns for unlawful targets and other law of war issues normally present in combatant operations.

Once the decision has been made to use force beyond that required for the immediate needs of unit or national defense, such force must conform to the international norms expressed as the laws of war. Therefore, wartime rules of engagement (WROE) and modified PROE for limited engagements¹²¹ will have to be in accordance with the laws of war. Two issues predominate ROE formulation. The primary issue will be the laws that deal with *targeting*. The second area of concern involves permissible *weapons*. The use of force against a particular target may be legal, but the weapon per se may not be legal; or, the weapon legal, but the manner in which it is employed still may be considered illegal because of consequential or collateral damage or injury.¹²² The laws of armed conflict require that the application of force must be in accord with the tests of military necessity, proportionality, and humanity.¹²³

Military necessity is the "principle which justifies those measures not forbidden by international law which are indispensable for securing the complete submission of the enemy as soon as possible."¹²⁴ The principle of proportionality provides "the link between the concepts of military necessity and humanity" and prohibits damage to noncombatants that is disproportionate to the military need.¹²⁵ Humanity is related to necessity and is concerned with the infliction of suffering, injury, or destruction not actually necessary for accomplishing legitimate military purposes.¹²⁶

C. Use of Force Under Domestic Law

1. *United States*.—The use of force in the context of domestic operations is governed by domestic law. *Tennessee v. Garner*¹²⁷ is considered to be the most relevant statement of the use of force in United States domestic disturbance situations.¹²⁸ Only minimum force can be used in response to a domestic disturbance and deadly force is permissible only if all lesser means have been exhausted, or are unavailable, and the risk of harming innocent persons is not increased significantly.¹²⁹ Additionally, force can be used to provide for self-defense only to avoid death or serious bodily harm, to prevent crime involving serious risk of death or serious bodily harm, to prevent the destruction of vital public health or safety and property, or to prevent the escape of a person who is a serious threat to persons or property.¹³⁰

2. *Canada*.—In Canada, the *Criminal Code*¹³¹ and the *National Defence Act*¹³² regulate the use of force. Members of the Canadian Armed Forces, acting in aid of the civil power, have the status of "constables" and therefore are "peace officers" under the provisions of the *Criminal Code*.¹³³ They thereby obtain the legal justifications and defenses accorded "peace officers" in performing their duties.¹³⁴

¹²⁰MacDonald, *supra* note 76, at 154.

¹²¹See *supra* text accompanying note 52.

¹²²The use of a MK-84 2000-pound bomb to eliminate a sniper located in a city building in which civilians are known to be sheltering is an example of a legal weapon being employed in an illegal manner.

¹²³Roach, *supra* note 2, at 51.

¹²⁴DEP'T ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE 4 (1956) [hereinafter FM 27-10]; see also, NWP 9 *supra* note 62, at 5-1, § 5.2.

¹²⁵CANADIAN FORCES, LAW OF ARMED CONFLICT MANUAL § 207 at 2-5 (2d draft n.d.).

¹²⁶*Id.* § 203, 2-3.

¹²⁷471 U.S. 1 (1985).

¹²⁸See OP. LAW HANDBOOK, *supra* note 22, at S-257; DEP'T DEFENSE, CIVIL DISTURBANCE PLAN ("Garden Plot").

¹²⁹DEP'T DEFENSE, CIVIL DISTURBANCE PLAN ("Garden Plot").

¹³⁰*Id.*

¹³¹R.S.C. ch. C-46 (1985).

¹³²*Supra* note 43.

¹³³Ken W. Watkin, *Legal Aspects of Internal Security: A Soldier's Protections and Obligations (Part I)*, 1 CAN. FORCES JAG J. 51, 58 (1985).

¹³⁴*Id.* at 60; Ken W. Watkin, *Legal Aspects of Internal Security: A Soldier's Protections and Obligations (Part II)*, 2 CAN. FORCES JAG J. 5 (1985).

Additionally, troops outside their home countries need to be aware of host country domestic law that may apply to the use of deadly force in self-defense. Ideally, status of forces agreements should address possible immunity from criminal or civil liability.

IV. Nonlegal Restrictions on the Use of Force

A. General

In addition to the legal restrictions on the use of force, other rationales exist for the political and military leadership to constrain the use of force. The reasons behind the restrictions often may not be obvious, nor will the commanders always be advised of the reasons. The obligation, nevertheless, is to follow the directions provided in the ROE. As an example of this situation, Colonel Parks refers to the United States Ambassador's restriction on the use of napalm in Laos during the Vietnam War because its "signature" was distinguished readily from artillery fire, and because air-dropping it would have indicated direct United States involvement in Laos.¹³⁵

The situation will dictate whether the restrictions imposed are necessary or desirable. Therefore, the situation should be considered during the drafting process to ensure that no unnecessary restrictions are placed on the troops who have been placed in harm's way. This section will explore ROE problems associated with differences in coalition forces' operating parameters. One problem area is the ratification—or nonratification—by coalition governments of Additional Protocol I to the Geneva Conventions of 1949 (API).¹³⁶ Countries—including Canada—that have ratified API will be subject to additional rules regarding the methods and means of warfare. Included in this area are possible agreements with a host country respecting the use of force or restrictions on particular weapons.

B. Political and Diplomatic Restrictions

A significant factor contributing to the success of the Persian Gulf coalition forces was the lack of restrictions on the wartime targeting selections made by United States Air Forces, Central Command Staff (CENTAF). This freedom starkly contrasted the Vietnam experience in which politicians severely limited the choice of what otherwise were legitimate military targets.

Valid political and diplomatic reasons may exist for conducting hostilities in a limited form. The NCA legitimately

makes this decision with the net result that restrictions would be imposed on the conduct of a military operation's employing force. Rules of engagement are the vehicle for articulating such restrictions.¹³⁷ Therefore, the ROE may restrict the engagement of certain targets, or the use of particular weapons, out of a desire not to antagonize the enemy, world opinion, or to keep the hostilities at a restricted level.

These limitations arise from strategic decisions regarding the prosecution of the war, or from peacetime political policies. Choices can be made about the aggressiveness with which an adversary can be pressured. In wartime, this issue will apply primarily to the air force, by which the concept of strategic bombing is supported in the tradition of Giulio Douhet and the other air power theorists.¹³⁸ To engage in such a course of military action is a political decision. One commentator noted the effects of the strategic bombing during the Gulf War as follows:

Paradoxically, the large-scale bombing of "strategic," yet not obviously military targets (e.g., the electric grid) within Iraq served as a popular affirmation of the Hussein regime's claim of Western hostility and barbarism. This only underscored the regime's claims to be a bulwark against what Iraqis—and many other Middle Eastern peoples—see, with some justification, as an uninterrupted pattern of Western cultural, military, and economic imperialism.¹³⁹

C. Military Restrictions

Military commanders are likely to impose restrictions on the use of force for military reasons. These restrictions are designed to conduct operations in accordance with the mission planning, to implement strategic goals, and—under some circumstances—to restrict the use of force in self-defense. General Schwarzkopf's quote at the beginning of this article approaches such a situation. Another wartime commander—Admiral Woodward—stated that he *did* restrict his subordinate commanders' rights of self-defense.

First and above all, I wanted precise control of when and how the 'war' started. So I invented a local procedure. . . . Until the moment I released, [signalling to start the war], as far as we were concerned, had not

¹³⁵Parks, *supra* note 14, at 91.

¹³⁶Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), Dec. 12, 1977, 1125 U.N.T.S. 3, reprinted in 197-198 INT'L REV. RED CROSS 3 (1977); 16 I.L.M. 1391 (1977); 72 AM. J. INT'L L. 457 (1978); DEP'T OF ARMY, PAMPHLET 27-1-1, PROTOCOLS TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 (1979) [hereinafter DA PAM. 27-1-1].

¹³⁷The wisdom in restricting a military operation's employing force is another issue. See, e.g., SUMMERS, *supra* note 54, at 48-50, 153-55.

¹³⁸See, e.g., DOUHET, THE COMMAND OF THE AIR (Dino Ferrari trans. & Richard H. Kohn & Joseph P. Harahan eds., 1983), quoted in SUMMERS, *supra* note 54, at 98-114.

¹³⁹Leo S. Mackay, "Voices from the Central Blue," *Comment and Discussion*, PROCEEDINGS, Mar. 1993, at 23, 24.

started. I had, in effect, taken away some of my commanders' right of self-defense, further restricting the rules from home which allowed them to fire back. But I did not want this war to go off at half-cock, because that would likely cause disastrous confusion and loss of control. . . .¹⁴⁰

Part of this process involves commanders' knowing their subordinate commanders. Admiral Woodward wrote the following in his diary of one of his destroyer captains:

Coward is reading more into the Rules of Engagement than is intended, and fancies starting the war all on his own. . . . Meanwhile I shall have to amplify the ROE so that all the Commanding Officers can know what I'm thinking, rather than apply their own interpretation, which might range from "Ask them for lunch" to "Nuke 'em for breakfast."¹⁴¹

Admiral Woodward also wrote the following:

I realized that considerable local amplification of the ROE was going to be critical. I was sure they made excellent sense at the political interface in Whitehall, but they were sometimes less than crystal clear in the front line, where there was no time for debate as to subtleties implied but not stated. In any case I had two senior commanders, in Barrow and Coward, who were basically reading them entirely differently, and I reckoned they, and no doubt others, needed advice as to how we were expected to behave during those vital first exchanges.¹⁴²

An additional aspect of operational control likely to be seen in wartime ROE is the requirement for positive identification of a target. This is to ensure that only legitimate targets are attacked. Denying the combatant the right to attack without positive identification forces two options. One is to go for

positive identification—which most often entails moving in closer for a visual confirmation—as was done during the air-to-air engagements in Vietnam.¹⁴³ The other option is not to attack. For bombing missions, the issue then becomes what to do with the unexpended ordnance?¹⁴⁴ The whole matter of targets of opportunity then becomes relevant.

1. *Tactical.*—Rules of engagement are prime vehicles for a commander to direct the conduct of operations of subordinate units in accordance with his or her broad plan. The permission to engage particular targets—while they may be engaged lawfully under the law of war—may be refused for very valid operational reasons. For example, a senior commander may wish that roads, railroad lines, and bridges not be destroyed so that they may be used in the future by his or her forces.¹⁴⁵ During the Gulf War, the Iraqi placed their fighter aircraft outside of important cultural properties in Iraq, such as the Temple at Ur. This was done either in the hopes that the aircraft would be shielded from attack or that the coalition would be weakened if the antiquities were damaged.¹⁴⁶ The Coalition forces decided not to attack these aircraft because they effectively were removed from combat and any gain from their being destroyed would have been outweighed if the buildings had been damaged.¹⁴⁷

Technology also affects the tactical component of ROE. Technology involves the individual unit's overall capabilities to conduct hostilities and to determine what adversary units are doing. Intelligence assets also provide knowledge on enemy units, equipment, and capability or operating parameters and these too may cause a commander to restrict operations.

2. *Safety.*—Rules of engagement should address the use of force. How a weapon is loaded or activated—or whether or not it is loaded—is not an appropriate use of force consideration. Such steps, however, are a potential escalatory factors if the adversary sees the arming of a weapon. While ROE should not repeat safety rules on operating a weapon, ROE can have safety purposes as the foundation of the rule. O'Connell advocates just such safety measures in his scheme for low and high tension naval ROE.¹⁴⁸ He proposed that, in

¹⁴⁰ WOODWARD, *supra* note 12, at 107-08.

¹⁴¹ *Id.* at 100.

¹⁴² *Id.* at 107.

¹⁴³ See, e.g., Parks, *supra* note 14, at 86. This restriction deprived United States pilots from using their long-range radar-guided missiles and exposed the weakness of the United States Navy F-4 Phantoms not being equipped with a gun when the engagement developed into a close-range dogfight.

¹⁴⁴ See, e.g., John G. Humphries, *Operations Law and the Rules of Engagement in Operations Desert Shield and Desert Storm*, AIRPOWER J., Fall 1992, 25, at 38.

¹⁴⁵ OP. LAW HANDBOOK, *supra* note 22, at H-86.

¹⁴⁶ W. Hays Parks, *The Gulf War: A Practitioner's View*, 10 DICK. J. INT'L L. 393, at 417 (1992).

¹⁴⁷ *Id.*

¹⁴⁸ See O'CONNELL, *supra* note 9, at 180.

low-tension conflicts, live weapons not be loaded and that weapons arming switches be set on safe.¹⁴⁹ In the current environment, the speed, accuracy, and destructibility of weapons available to most nations warrant serious consideration of such limitations. If the types of measures proposed by O'Connell, however, are taken for fear of possible accidental firing, they certainly would detract from the commander's discretion to decide whether the threat posed warranted being prepared to respond, either by visibly arming a weapon, or by being prepared to fire in self-defense immediately.

Safety is a legitimate rationale for an ROE restriction, particularly when it provides a means to prevent "blue-on-blue" engagements—that is, shooting at friendly forces.¹⁵⁰ Because the Gulf War was a resounding success—in terms of the few casualties that the coalition forces suffered at the hands of enemy action—the deaths from friendly fire were all the more distressing.

Norman Friedman described this aspect of the air forces' ROE in place during the Gulf War as follows:

One great surprise of the air campaign was the complete absence of self-inflicted aircraft losses (blue-on-blue). . . . It seems more realistic to assume that, fighting a relatively immobile opponent, aircraft could be assigned relatively rigid lists of targets, centrally controlled, so that interlopers were relatively easy to detect. The ATO, AWACS, and a *rigid rule of engagement* (ROE) interlopers [sic] were all very important.

It was probably even more vital that anti-aircraft responsibility was limited to fighters, which were subject to fairly tight control. Antiaircraft guns and missiles, much more difficult to control, were all but prohibited from firing. . . .

CENTAF imposed rigid rules of engagement to avoid accidental fighter-on-fighter combat; it was always afraid that a U.S. air-

plane would shoot down a coalition fighter of a type also used by Iraq.¹⁵¹

Friedman concluded, "This system of ROE was relatively cumbersome, but it functioned well enough in a sky filled with friendly fighters, against a fairly unaggressive enemy air force."¹⁵²

While the fear of friendly fire incidents may have dominated much of the thinking behind the ROE requiring positive identification of potential aerial targets, the legitimate concern for firing on a neutral could be catastrophic even for the successful conduct of the war. The prevention of such "blue-on-white" engagements can be considered as either a safety, or as an international law, limitation. Under international law, targeting neutrals is prohibited as long as they are not assisting the enemy actively.¹⁵³ Consequently, because the legal aspects of neutrality are so certain, ROE involvement must be considered more a safety matter than one of legal restriction. The difficult issue will be to what extent forces can determine whether the target is neutral, friendly, or adversarial. Another real-world example effectively illustrates these issues.

Admiral Woodward cited an incident during the Falklands War reminiscent of the incident in which the *Vincennes* shot down an Iran Air Airbus just over six years later. The British Naval Task Group, on its way towards the British Maritime Exclusion Zone around the Falklands Islands, was being shadowed by an Argentine Air Force Boeing 707. The Admiral had the following concern:

Am I going to let this "Burglar" go on reporting our latest position back to Argentinian headquarters, possibly telling their carrier where to send a preemptive air strike? Or am I going to "splash" him, in flagrant defiance of my own Rules of Engagement, perhaps to save ships and lives in my own forces?¹⁵⁴

Admiral Woodward's solution was to "tweak" his headquarters into leaking information that permission had been granted to shoot down the aircraft, to dissuade the 707 from venturing out.¹⁵⁵ To his surprise, permission was granted and

¹⁴⁹ *Id.*

¹⁵⁰ The phrase "amicide" was introduced by the United States Army for "blue-on-blue" engagements. The more commonly used term "fratricide" is incorrect because it involves murder—an unlawful, rather than an accidental, act. See Shrader, *Amicide: The Problem of Friendly Fire in Modern War*, U.S. Army Command & General Staff College Studies Institute Research Survey No. 1 (1982), quoted in Parks, *supra* note 14, at 93, n.7.

¹⁵¹ FRIEDMAN, *DESERT VICTORY: THE WAR FOR KUWAIT* 188 (1991) (emphasis added).

¹⁵² *Id.* at 189.

¹⁵³ The concept that neutral targets should not be engaged is so apparent that the 1907 Hague Conventions fail to address this issue—only the way a neutral state or person can lose neutral status is specified. See Hague Convention No. III Relative to the Opening of Hostilities, Oct. 18, 1907, 36 Stat. 2259; T.S. No. 538, Articles 2 & 3; Hague V, *supra* note 35; Hague Convention XIII Concerning the Rights and Duties of Neutral Powers in Naval War, Oct. 18, 1907, 36 Stat. 2415, T.S. No. 545, 3 Martens Nouveau Recueil (Ser. 3) 713, reprinted in 2 AM. J. INT'L L. SUPP. 202 (1908) [hereinafter Hague XIII]; FM 27-10, *supra* note 124, at 184, §§ 512-13.

¹⁵⁴ WOODWARD, *supra* note 12, at 101.

¹⁵⁵ *Id.* at 102.

ROE were modified so that the Argentine aircraft could be engaged within a certain range of the fleet.¹⁵⁶ The next appearance did not result in an intercept, but, on the evening of 23 April 1982, an aircraft approached at high altitude from the southeast.¹⁵⁷ The Sea Dart system on H.M.S. *Invincible* locked on the aircraft outside the ROE engagement range, but Admiral Woodward was unsure as to whether this was the same Argentine Air Force Boeing 707.¹⁵⁸ The staff confirmed that no commercial air flights were scheduled over that portion of the South Atlantic, but twenty seconds from giving the order to fire, a check of the plot of the flight's route determined that the aircraft was on a direct line from Durban, South Africa, to Rio de Janeiro, Brazil.¹⁵⁹ The aircraft was a Brazilian airliner.¹⁶⁰ While Admiral Woodward did not make much of the incident at the time,¹⁶¹ he later noted the following:

But if we had made a mistake, it would have meant the kind of world-news furore that so haunted the Soviets after they shot down the Korean 747 on 1 September 1983. . . .

I have considered that short scenario many times since, searching for the real reason for hesitating at the last moment. I believe I must have been thinking, "This contact is no immediate threat to me. He is not going to bomb us, the worst he can do is report our position, and do I really need to obliterate him if there is even the tiniest risk of being wrong? Have I met all the criteria for "positive identification"—height, speed, radar, general behaviour?" *Yes*. But positive identification? Plainly, I tried very hard to find a reason *not* to shoot, without having given much consideration to the consequences of getting it wrong. But in light of the KAL 007 incident, this was another of my lucky days. *If* we had shot that airliner down, it would have probably left the Americans with no choice but to withdraw their support; the Task Force would have had to be recalled; the Falklands would be the Malvinas; and I would have been court-mar-

tialled. These would have been the consequences of the international community's rightful horror at the news of a battle group shooting down several hundred civilians by mistake.¹⁶²

Admiral Woodward's observations highlight several points about ROE beyond their utility for safety purposes. Rigid ROE can work and—while they may be seen to be limiting—they actually may enhance military operations. As was proven in the Gulf War, sound tactical or strategic reasons often are behind stringent controls. The reasons for such restrictions may not be readily apparent to other units or services subject to the same rules, but they necessarily must be obeyed.

V. Analytical Considerations

A. General Considerations

Rules of engagement cannot be drafted, reviewed, or implemented without a rational analytical structure behind their formulation. Therefore, strategists must consider the various peculiarities, requirements, and technological considerations that play a prominent role in discerning potentially hostile acts or delineating hostile intent. The interplay between legal and operational input into ROE also will be discussed.

The JCS PROE are the means by which the National Command Authority—through the Joint Chiefs of Staff—authorize competent military commanders to take actions necessary for the defense of units, nationals, and national assets.¹⁶³ Such directives must be fully cognizant of international law and national security objectives.¹⁶⁴

B. Hostile Act and Hostile Intent

The U.N. Charter restricts peacetime limitations on the unilateral use of force to cases of self-defense. Accordingly, peacetime responses to threats will be defensive in nature with the concepts of necessity and proportionality governing the particular response. The choices made will depend on

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 102-03.

¹⁶⁰ *Id.* at 103.

¹⁶¹ Admiral Woodward wrote in his diary, "Intercepted a Brazilian Airliner—international scene?" *Id.*

¹⁶² *Id.* at 103-04.

¹⁶³ NWP 9, *supra* note 62, at 4-4.

¹⁶⁴ *Id.*

whether a hostile act or hostile intent exists. The presence of a hostile act will provide the clearest entitlement to use force in self-defense. A hostile act may not equate necessarily with the Charter's definition of armed attack because some actions may occur that are not armed attacks, but that do constitute belligerent acts.¹⁶⁵ The ROE governing the use of force in cases of a hostile act may restrict which weapons can be employed or they may address the proportionality of the response, such as directing the return of defensive fire only.

The more specifically the ROE describe hostile acts, the more particular authorized responses can be prescribed.¹⁶⁶ Particularized, preapproved responses in ROE afford greater control over the use of force and the possible escalation of the incident. Additionally, such particularity in the ROE saves the individual from having to decide in the excitement, or anxiety, of the moment which of several responses to use. The rules, however, should not be so particularized as to remove all flexibility. Furthermore, for some services, the responses will be limited by the availability of weapons. Therefore, an infantry squad will have fewer options on how to respond to incoming fire than would a large warship with several missiles and gun types from which to choose. Additionally, such specificity will benefit smaller units, when junior leaders are responsible for these decisions. The responses necessarily will need to be clear, understandable, and not too complicated for the individual to memorize and to use immediately.¹⁶⁷ Commanders only can benefit from early exposure to, and frequent practice with, the ROE.

Hostile intent is a more difficult concept to grasp. Professor O'Connell noted that, if "no plausible index of the translation of 'hostile intent' into 'hostile act'" exists, a decision has to be made whether to receive the attack in the first instance.¹⁶⁸ If the political or military risk is unacceptable, he proposed crafting the rules to emphasize tactical evasion and defense.¹⁶⁹

To determine whether hostile intent exists, the interface between the law, operations, and intelligence is significant. In the more technically oriented services—namely the air force and navy—in which machines generally are the basis of the fighting, the threat usually will be exhibited by a radar or

other electronic indication, along with a particular behavior pattern. With land forces, however, only a particular behavior pattern may demonstrate hostile intent. In the land context, it may range from verbal threats and taunts to the actions of loading, aiming, and preparing to fire, perhaps from a position of cover or defense.

Part of the equation in determining the ROE will be the assessment of the value of the units or assets exposed to a potential adversary. Political reasons could dictate that a particular unit in harm's way be sacrificed to a hostile act and that the ROE will proscribe any use of force in self-defense. This approach, however, is unlikely to occur; the more likely scenario will be the protection of particular assets. Some units will be uniquely valuable—referred to as high value assets (HVAs)—and, therefore, the ROE will reflect special measures or precautions with respect to these units. Several different measures will be part of this analysis. The number of persons that are threatened with death or injury will be critical. The cost or size of the unit or weapons system also will be a significant consideration; therefore, aircraft carriers and AWACS presumably are HVAs. Other measures of the importance of a weapon must be appraised. For instance, nuclear weapons likely are to be highly valued so that any threat to them cannot be tolerated. Finally, the ability of a particular unit to absorb a hit from the attacker also will have to be factored into the analysis.

C. Peacetime ROE

Captain Roach indicated that peacetime ROE "do not address the right to protect the individual, the commanding officer, the unit commander and his [or her] command from attack or the threat of imminent attack in situations involving localized conflict, or in low-level situations that are not preliminary to prolonged engagement."¹⁷⁰ Such concerns are addressed through the standard warning that nothing in the rules is "intended to limit the commander's right of self-defense."¹⁷¹ Instead, PROE "provide guidance on when armed force can be used to protect the larger national interests, such as the territory of the United States, or to defend against attacks on other U.S. forces not under your command."¹⁷²

¹⁶⁵ O'CONNELL, *supra* note 9, at 71.

¹⁶⁶ The JCS PROE provide numerous specific examples of hostile acts in the context of operational platforms and capabilities.

¹⁶⁷ Canadian pilots in the Gulf War benefited from concise and easily understood ROE. As a back-up, however, they were controlled by either an AWACS or a United States Navy ship. They did not always have direct communication with Canadian authorities. The author was advised by a Royal Air Force (RAF) squadron leader who participated in the Gulf War that its aircrews were supported by an air weapons controller who was receiving the same radar picture as the AWACS. Through coded radio transmissions from this controller and the senior British officer present, the authorization to fire would have been given even if the AWACS already had granted the "weapons free" order. This arrangement retained the element of national control over the RAF aircraft.

¹⁶⁸ O'CONNELL, *supra* note 9, at 172.

¹⁶⁹ *Id.*

¹⁷⁰ Roach, *supra* note 2, at 49.

¹⁷¹ *Id.*

¹⁷² *Id.*

1. *Army*.—In pure peacetime situations, army forces, because they do not operate regularly in close proximity to potential opponents—unlike air and naval forces over or on the high seas—primarily require PROE that address the classic right of self-defense of individuals. This approach applies to the North Atlantic Treaty Organization forces stationed in Europe and the United States troops in Korea. Even though it still may be a peacetime situation, operations or exercises in an area of tension, peacekeeping operations, humanitarian assistance operations, or noncombatant evacuation operations (NEO) require much more detailed rules to address the possible threats in those circumstances. The factors to consider are the authorized responses to various types of terrorist attacks, sniper fire, and minor acts of aggression, such as rock throwing, simple assaults, and other forms of harassment.

2. *Navy*.—The naval community has become familiar with PROE. Because of the nature of the high seas, navies for centuries have had to operate with their potential adversaries present behind, beside, and sometimes among them. Often, the other force's ships have intruded into a formation or affected flight operations. While much of the problem stems from the maneuvering of the ships and is covered by the 1972 International Regulations for Preventing Collisions at Sea (International Rules of the Road or COLREGS),¹⁷³ this treaty could not prevent all incidents. Additional agreements were negotiated between the United States, Canadian, and Royal Navies and the former Soviet Union.¹⁷⁴

Peacetime rules of engagement must address the permissible employment of "systems and platforms for surveillance, targeting and ordnance delivery"¹⁷⁵ because they are the precursors to the use of force. For instance, activating fire control radars in the presence of another vessel or aircraft, or training an optically guided weapon on an opponent could be

seen as expressions of hostile intent, if not hostile acts.¹⁷⁶ Rules of engagement also need to consider the permissible responses to such actions by an adversary. Ideally, the particular radar bands or frequency types should be addressed, based on the known characteristics of the enemy's weapons and the tactical employment of them. Accordingly, radar-guided missiles from an independent source will require a different consideration than "fire and forget" missiles, or those that emit their own radar guidance signal.¹⁷⁷

Professor O'Connell described a graduated set of possible ROE in peacetime naval disputes. He began with "interrogation, requests to stop, the firing of warning shots and disabling shots when it is necessary to compel submission to visit to search, [and] boarding (which may be courteous or forceful)."¹⁷⁸ He then dealt with the escalation of the crisis by the opponent choosing to "invoke its own view of the law."¹⁷⁹ An example of this escalation would be "catching the opponent at a disadvantage" by the "manipulation of the rules of the road, harassment and interposition."¹⁸⁰ The ROE for these situations should prescribe every course of action taken with the concept of minimum force, including the form of verbal warnings to be given and the intricacies of boarding to be employed while underway.¹⁸¹

Employing naval forces abroad raises different issues present in naval units patrolling their coastal waters; the latter situation makes relying on self-defense slightly easier.¹⁸² If the navy is being employed in a political power-projection role, the reliance on international law must be even stronger than when at home.¹⁸³ O'Connell noted, however, that defense of shipping abroad is similar to the coastal defense role.¹⁸⁴ For instance, during the Iran-Iraq "Tanker War," the United States Navy used force in exercising the right of self-defense. On the night of September 1987, a Navy helicopter observed the

¹⁷³ 28 U.S.T. 3459, 33 U.S.C. § 1602 (1988).

¹⁷⁴ See Agreement on the Prevention of Incidents On and Over the High Seas, 25 May 1972, U.S.-U.S.S.R., 23 U.S.T. 1168; Protocol to Agreement on the Prevention of Incidents On and Over the High Seas, 22 May 1973, U.S.-U.S.S.R., 24 U.S.T. 1063; Agreement Concerning the Prevention of Incidents at Sea Beyond the Territorial Sea, Canada-U.S.S.R., 20 Nov. 1989; Agreement Concerning the Prevention of Incidents at Sea Beyond the Territorial Sea, U.K.-U.S.S.R. 1986, U.K.T.S. No. 5; 37 INT'L & COMP. L.Q. 420 (1988); Agreement on the Prevention of Dangerous Military Activities, U.S.-U.S.S.R., 1989, 28 I.L.M. 877.

¹⁷⁵ Roach, *supra* note 2, at 52.

¹⁷⁶ O'CONNELL, *supra* note 9, at 82.

¹⁷⁷ *Id.* at 71-72, 81-82.

¹⁷⁸ *Id.* at 171.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.* at 175.

¹⁸² *Id.* at 173.

¹⁸³ *Id.*

¹⁸⁴ *Id.*; see also, J. Ashley Roach, *Missiles on Target: Targeting and Defense Zones in the Tanker War*, 31 VA. J. INT'L L. 592 (1991); F.L. Wiswall, Jr., *Neutrality, the Rights of Shipping and the Use of Force in the Persian Gulf*, 31 VA. J. INT'L L. 619, 623 (1991).

Iran Ajr laying mines in international shipping lanes. Consequently, the ship was attacked by gunfire and ceased laying the mines. The ship subsequently was boarded and then sunk.¹⁸⁵ This was not the only use of force by the United States during this time.¹⁸⁶ "Modest" French naval forces made public their ROE, which "declare[d] that French warships [would] fire upon forces that refuse[d] to break off attacks on neutral merchant ships when French vessels [were responding] to distress calls from vessels under attack."¹⁸⁷

The use of force and ROE for warships on the high seas may not always rely on self-defense as the basis of their actions. Ships used for law enforcement must comply with the international law of visit and search.¹⁸⁸ The doctrine of hot pursuit and the enforcement of national laws or international fisheries agreements must be consulted for the authority to engage in such actions.¹⁸⁹ The right of hot pursuit and the requirement that it be immediate and continuous¹⁹⁰ should not be confused with the right to pursue hostile forces that still pose an immediate threat.¹⁹¹ Rules of engagement limitations in this area will regulate the geographic areas where such pursuit can take place. These limitations more than likely will prohibit pursuit into neutral countries, except when that country refuses, or is unable, to stop such hostile acts from emanating from its territory.¹⁹² The ROE also may preclude engaging the hostile force in its own territory as a way of limiting the conflict.¹⁹³

3. *Air Force*.—The United States and Canadian Air Forces also are familiar with PROE from the North American Aerospace Defense (NORAD) command defensive intercepts of

Soviet Tupolev Tu-20 Bear bombers off the North American continent. The ROE in these situations are based on flight information regions (FIR), air defense identification zones (ADIZ),¹⁹⁴ flight path filings, and the principle of the inviolability of national air space.¹⁹⁵ Under international law, unauthorized aircraft intruding into national airspace can be required to turn back or to land.¹⁹⁶

Like naval ROE, air force ROE will be technical, because indications of hostile acts or hostile intent will come mainly from electronic indications and warnings. The tactical maneuvering of an adversary also may display hostile intent. A prime example was the 4 January 1989 shooting down of two Libyan MiG-23s over the Gulf of Sidra. The well-publicized "Head Up" display video recording that captured the pilot's concern at the Libyan aircraft having "jinked back at [him] for the fifth time" demonstrates the tactical importance of such matters.¹⁹⁷

D. Transition to WROE

Peacetime rules of engagement need to have a mechanism for the transition from peace to wartime rules. This can be done either by easing some of the restrictions or, in the event of sudden hostilities, by immediately changing to WROE. The United States Army's operational law handbook suggests the following three-phase process: (1) "Rules of Engagement Green" when no likely threat of hostilities exists and only normal self-defense and security of key facilities is authorized; (2) "Rules of Engagement Amber" when a credible threat of attack exists and, despite an increased state of readiness, no

¹⁸⁵David L. Peace, "Major Maritime Events in the Persian Gulf War" in *Neutrality, the Rights of Shipping and the Use of Force in the Persian Gulf War (Part I)*, AM. SOC'Y INT'L L. PROC. 146, 151 (1988).

¹⁸⁶*Id.* at 152-153; see also Ronald O'Rourke, *Gulf Ops*, PROCEEDINGS, May 1989, at 54; Bud Langston, *The Air View: Operation Praying Mantis*, PROCEEDINGS, May 1989, at 66; J.B. Perkins, *The Surface View: Operation Praying Mantis*, PROCEEDINGS, May 1989, at 66; David L. Peace, *Major Maritime Events in the Persian Gulf Between 1984 and 1991: A Juridical Analysis*, 31 VA. J. INT'L L. 545 (1991).

¹⁸⁷Frank L. Wiswall, "Remarks," in *Neutrality, the Rights of Shipping and the Use of Force in the Persian Gulf War (Part II)*, AM. SOC'Y INT'L L. PROC. 594, 596 (1988).

¹⁸⁸O'CONNELL, *supra* note 9, at 174.

¹⁸⁹William J. Fenrick, *Legal Limits on the Use of Force by Canadian Warships Engaged in Law Enforcement*, 18 CAN. Y.B. INT'L L. 113, 114, 123-28, 143 (1980). Because of the Posse Comitatus Act, 18 U.S.C. § 1385 (1988), United States warships are precluded from aiding civilian law enforcement authorities in keeping the peace and arresting felons. For the purposes of narcotic interdiction, however, naval vessels can undertake such activities when a Coast Guard officer—trained in, and authorized to arrest, search, and seize property—is present. NWP 9, *supra* note 62, §§ 3.12, 3.12.4. For the powers in hot pursuit, piracy, and the suppression of slavery, see *id.* §§ 3.9, 3.4, 3.5, respectively.

¹⁹⁰See, e.g., NWP 9, *supra* note 62, § 3.9.

¹⁹¹Roach, *supra* note 2, at 50.

¹⁹²*Id.*

¹⁹³*Id.*

¹⁹⁴See 14 C.F.R. pt. 99 FAA regulations (1992).

¹⁹⁵See e.g., NWP 9, *supra* note 62, § 2.5.

¹⁹⁶*Id.* § 4.4.

¹⁹⁷Magnuson, *supra* note 46, at 16.

increased authorization to engage targets is required; and (3) "Rules of Engagement Red" when an attack has occurred or the commander specifically has authorized an attack.¹⁹⁸ These conditions are exemplified by an unfortunate example.

The Department of Defense commission that examined the bombing of the Marine barracks at the Beirut International Airport noted that the Marines deployed in September 1982 to a fairly benign environment. By mid-March 1983, however, the conditions had changed drastically. First, a grenade attack wounded five Marines.¹⁹⁹ Then, on 18 April 1983, the United States Embassy was destroyed, killing sixty people (including seventeen Americans). Additional United States casualties from mortar and sniper attacks at the Beirut International Airport followed. "By the end of September 1983, the situation in Lebanon had changed to the extent that not one of the initial conditions upon which the mission statement was premised was still valid. The environment clearly was hostile."²⁰⁰ Following the bombing of the embassy, the ROE were changed for the Marines guarding the temporary embassy (The "Blue Card") but not for the other positions (The "White Card"). The commission criticized the lack of a change in the ROE from the initial peaceful period to the later period, when hostilities were imminent by stating, "The emergence of the terrorist threat brought the guidance and flexibility afforded by the ROE into question. . . . The ROE provided in May for the Embassy security contingent should have been explicitly extended to the entire USMNF."²⁰¹

Once a conflict has ended—through either a cease-fire or an armistice—the ROE need to be revised. The rules will not be full PROE, but rather will reflect some of the terms and conditions of the cease-fire.²⁰²

E. Wartime Rules of Engagement

Wartime rules of engagement should not restrict the use of force only to defensive actions, but should reflect an offensive mindset. They should, however, permit the operational commander to seek out, engage, and destroy the enemy forces.

The WROE, however, may restrict that responsibility so as to be "consistent with national objectives, strategy, and the law of armed conflict."²⁰³ Limiting the means and methods of warfare will affect a unit's tactics. Nothing prevents ROE from being used as operational controls on the conduct of offensive operations.

Rules of engagement should not restate the law of war even though the law of war pertains to the use of force. Merely restating the law of war would be cumbersome and not offer the commander any further guidance on how to employ his or her forces.²⁰⁴

1. *Army*.—Wartime rules of engagement for land forces will be concerned with targeting. The individual soldier armed with only a rifle is limited in the ability to attack targets other than persons. Much of the control over the use of force by such an individual comes from regular training and the tactical control from the squad or platoon leader. Also, some squad weapons—such as the use of mines and booby traps—may be restricted by the ROE for military reasons rather than the concern for collateral damage. For larger units or when the variety and power of the weapons available increases—such as with antitank weapons, artillery, or involving air support—additional restrictions will be encountered. When the weapons used increase in destructive force and range, ROE need to address the engagement of proper or permitted targets and the engagement of targets beyond visual range. Therefore, artillery units with various munitions will be concerned about their abilities to engage unseen targets by indirect fire. Engineering units may be restricted in employing mine fields. These restrictions could be for operational reasons or for broader political reasons.

2. *Navy*.—Naval warfare is unique, involving several of the 1907 Hague Conventions applying to war at sea.²⁰⁵ These conventions—and the naval history that has affected customary international law in the area—have resulted in a highly specialized area of law of naval war.²⁰⁶

¹⁹⁸OP. LAW HANDBOOK, *supra* note 22, at H-95.

¹⁹⁹Report of the Department of Defense Commission on the Beirut International Airport Terrorist Act, Oct. 23, 1983, at 39 (Dec. 20, 1983) [hereinafter Long Commission Report].

²⁰⁰*Id.* at 39-40.

²⁰¹*Id.* at 47.

²⁰²Parks, *supra* note 146, at 419.

²⁰³NWP 9, *supra* note 62, at 5-4.

²⁰⁴OP. LAW HANDBOOK, *supra* note 22, at H-86. The *Operations Law Handbook* recommends that the Hague and Geneva Conventions Restatements be placed instead in the Field Standard Operating Procedures (FSOP). *Id.*

²⁰⁵Hague Convention VI Relating to the Status of Enemy Merchant Ships at the Outbreak of Hostilities, Oct. 18, 1907, *reprinted in*, DEP'T ARMY, PAMPHLET 27-161-2, II INTERNATIONAL LAW 279 [hereinafter DA PAM. 27-161-2]; Hague Convention VII Relating to the Conversion of Merchant Ships into Warships, Oct. 18, 1907, *reprinted in*, DA PAM. 27-161-2, 283; Hague VIII, *supra* note 35; Hague IX, *supra* note 35; Hague XIII, *supra* note 153.

²⁰⁶*See, e.g.*, Frank Russo, *Targeting Theory in the Law of Naval Warfare*, 40 NAVAL L. REV. 1 (1992); W.J. Fenrick, *Legal Aspects of Targeting in the Law of Naval Warfare*, 29 CAN. Y.B. INT'L L. 238 (1991); Wolff H. von Heinegg, *Visit, Search, Diversion, and Capture in Naval Warfare: Part I, The Traditional Law*, 29 CAN. Y.B. INT'L L. 283 (1991); Jane Gilliland, *Submarines and Targets: Suggestions for New Codified Rules for Submarine Warfare*, 73 GEO. L.J. 975 (1985).

Wartime ROE must be tailored for separate areas, forces, or missions,²⁰⁷ depending on the particular conditions. For example, two sets of ROE existed during the Vietnam War for Operations Market Time and Sea Dragon.²⁰⁸ Because the focus of the former operation off the coast of South Vietnam was surveillance and coastal protection, the ROE contained directions regarding the necessary positive identification required and the "specified instant when fire might be directed," depending on whether the vessels were in the territorial sea, contiguous zone, or on the high seas.²⁰⁹ Additionally, the ROE dealt with the interception of shipping approaching the contiguous zone of South Vietnam and included directions regarding the use of force in the case of hot pursuit.²¹⁰ Instructions supplemental to the ROE were given in operational orders that covered ROE issues such as foreign warships in the territorial sea, the instances when ships were considered not to be engaged in innocent passage, identification parameters, the immediate pursuit of a ship that had committed a hostile act versus hot pursuit of a ship that had contravened South Vietnamese law, the mining of illegal entry points, visit and search procedures and occasions, and the degree of force to be employed.²¹¹ Conversely, Operation Sea Dragon's ROE dealt with the offensive tactical issues of harassment and the interdiction of North Vietnam's supply lines, and yet still were expressed in defensive terms.²¹² The use of force was confined to the area of the North Vietnamese twelve-mile territorial sea.²¹³

3. *Air Force.*—During the Gulf War, the air forces were controlled strictly for safety reasons. Maximum use was made of the various aircrafts' EW suites and the abilities of United States Air Force E-3 AWACS and United States Navy E-2C Hawkeyes to provide information on the presence and types of threat. Norman Friedman stated that two independent electronic identifications had to be obtained before an engagement was authorized. The F-15s and F/A-18s had noncooperative recognition based on enemy turbine or compressor rate (NCTR), identification friend-or-foe (IFF) and another classi-

fied systems to make the identification, but the F-14s did not.²¹⁴ Therefore, the ROE had to take into account these technical disparities between platforms. Future aerial conflicts likely will encounter similar problems of beyond-visual-range identification and over-the-horizon targeting. The missiles employed on modern aircraft allow for the occurrence of such engagements, but the concerns for downing a friendly or neutral aircraft restricts their being employed. This was a viable concern in Vietnam where the ROE required visual identification because the electronic capabilities were not ideal.

Additional controls that ROE can establish include "the use of approach corridors, airspace control zones, restricted operations areas, low-level transit routes, and altitudes and speed restrictions to minimize risks to friendly forces from friendly fire."²¹⁵ These restrictions reduce the possibility of friendly fire incidents and enable "simultaneous attack of targets near each other by multiple fire support means."²¹⁶

F. Exercise Rules of Engagement

Exercise rules of engagement should serve two purposes. The first and primary purpose is to provide the necessary PROE for the exercise of unit or national self-defense in the face of actual hostile intent or a hostile attack while on exercise. These rules most likely will be required when the forces are on exercise deployment overseas, although troops also may be subject to attack while at home. Most likely, the host nation will be providing the security for the visiting exercise forces; therefore, the ROE should reflect this factor.²¹⁷

As Captain Roach noted, ROE need to be made part of exercises.²¹⁸ While the ROE used in an exercise may not be the actual PROE or WROE for security reasons, they should be crafted realistically to represent the types of restrictions or authorizations envisioned by the conflict exercise scenario.

²⁰⁷For a discussion of the problems inherent in having different rules apply, see Long Commission Report, *supra* note 199.

²⁰⁸O'CONNELL, *supra* note 9, at 176.

²⁰⁹*Id.*

²¹⁰*Id.*

²¹¹*Id.*

²¹²*Id.* at 177.

²¹³*Id.*

²¹⁴FRIEDMAN, *supra* note 151, at 189; Parks, *supra* note 14, at 87.

²¹⁵Parks, *supra* note 14, at 87.

²¹⁶*Id.*

²¹⁷OP. LAW HANDBOOK, *supra* note 22, at H-90.

²¹⁸Roach, *supra* note at 46.

Those who would be required to apply the ROE need the opportunity to work with ROE and develop the familiarity with the degree of control they exercise over the units or weapons. These individuals need to determine whether the ROE are crafted to be understandable, useable, and realistic for the operation. If not, the exercise is the appropriate time to discover any weaknesses and to start the necessary staff work to effect changes.

Admiral Woodward was emphatic in his memoirs that an exercise, which he conducted with the U.S.S. *Coral Sea* (CV-43) carrier group in the Arabian Sea in November 1981, taught him a lot about the importance of ROE and maritime exclusion zones.

[B]ut for my part I was interested, for some near-providential reason, in examining how to use exclusion zones to the best advantage. This also covered the intricacies of Rules of Engagement during the most difficult times when you may be moving from apparent peace to obvious war. Just about everything I achieved, every lesson learned in those forty-eight hours, had a direct and critical influence on my actions six months later in the South Atlantic in a war I could not possibly have foreseen . . . and I was also well aware of how carefully you must study the ramifications of your Rules of Engagement, remembering that they have been drawn up jointly by both politicians and the military.²¹⁹

G. Coalition Rules of Engagement

Any future crisis in which force is used likely will be fought by coalition troops rather than on a unilateral basis.²²⁰

²¹⁹ WOODWARD, *supra* note 12, at 67.

²²⁰ Freeman et al., *supra* note 5, at 4.

²²¹ *Id.*

²²² *Id.* at 5.

²²³ *Id.* at 6.

²²⁴ In the case of the CAPs over the Gulf during Desert Shield, Canadian CF-18s were acting under the overall command of CENTCOM. Later, during the war—particularly during the strategic bombing campaign—the “Desert Cats” were integrated fully into bombing missions as sweep escorts for the bombers.

²²⁵ For other legal issues associated with coalition warfare see, R.R. Baxter, *Constitutional Forms and Some Legal Problems of International Military Command*, 29 BRIT. Y.B. INT’L L. 325, 352-59 (1953), Gunther Moritz, *The Common Application of the Laws of War Within the NATO-Forces*, MIL. L. REV. 1 (1961).

²²⁶ Humphries, *supra* note 144, at 27.

²²⁷ *Id.* at 40, n.13.

²²⁸ *Id.* at 28. Lieutenant Colonel Humphries claimed that the Desert Storm ROE regularly contained 20 pages of off-limits targets driven by political considerations. *Id.* at 41, n.52.

²²⁹ The first draft of the CENTAF WROE was 18 pages long, but ultimately was distilled to only four pages covering the “generic precepts for coalition operations.” *Id.* at 29-30. These rules were supplemented by appendices that addressed rules for “unique, sensitive U.S. operations.” *Id.*

²³⁰ See sources cited *supra* note 136.

Part of the coalition-building process will involve defining “common objectives, strategy and command arrangements, ideally achieving unity of command.”²²¹ In the absence of “political clarity and unanimity . . . national tendencies to oversupervise and control their own forces undercuts the common cause.”²²² The subordination of units to another nation’s commanders and national sensitivities about representation and visibility compounds the difficulties of coalition operations.²²³

When coalition forces operate under the command of one nation, or are integrated into the operations of another force—as the Canadians were during the Gulf War²²⁴—the ROE will have to be coordinated.²²⁵ One commentator has noted that, while the law of armed conflict is binding on all nations, each nation in a coalition may not have the same ROE because ROE are limited by national policy.²²⁶ In the case of the coalition forces in the Gulf War, CENTAF “succeeded in harmonizing [the national ROEs] through negotiations with representatives of each coalition air force.”²²⁷ As with national ROE, coalition ROE are subject to the same “collateral limitations” of “political considerations, national policy objectives, and operational concerns.”²²⁸

When the forces fight as fairly autonomous units—particularly land forces that have distinct sectors of responsibility—the problem of different ROE will not be major. Each national force can engage the enemy in keeping with its understanding of the laws of war. Nevertheless, when the target selection is controlled centrally—as with the air campaign of the Gulf War—each nation probably will want its own review mechanism to ensure that the targets allocated to its nation’s aircraft conform to its notions of the law of war.²²⁹

This will be most evident in the case of countries that have ratified ADI.²³⁰ These parties will be subject to that Proto-

col's generally tighter targeting restrictions, particularly those designed to protect the civilian populations.²³¹

VI. Procedural Issues

A. General

Drafting ROE is a critical process. As Professor O'Connell noted, insufficient time—even during an escalating crisis—may preclude adequate rules to be developed; therefore, “the drafting operation is likely to be successful only if there has been the requisite thinking in advance about the questions that could arise, including the tactical factors that enter into the processes of legal appraisal.”²³² How this process is undertaken and the quality of the participants will determine the eventual success of the rules.

Rules of engagement are designed to be part of an operations plans and orders. The procedural aspects involved in ROE are drafting, reviewing, approving, modifying, and ultimately applying them. These tasks will be performed by the many authority levels involved in ROE procedural matters. The stages at which this can be performed include the individual service member, units, larger formations, joint or combined forces, and national and coalition command authorities. While the role for each will vary, depending on its hierarchal location in the chain of command, each level should play a part in the production of ROE to develop a more realistic set of rules. The lower levels should have the greatest familiarity with the troops' abilities and understanding of the weapons systems' capabilities. The higher headquarters should provide the necessary appreciation of the broader strategic, political, or policy goals and parameters.

The primary consideration to remember when drafting either PROE or WROE is that the final version should not restrict or negate the inherent right of self-defense. Wartime rules of engagement also should not limit the commander's discretion any more than is absolutely necessary in employing forces in furtherance of the mission.

B. Drafting ROE

While little has been written on the methodology for drafting ROE, legal officers and operational officers often discuss who should draft ROE—lawyer or soldier, sailor, pilot. While the design of anything by “committee” often is frowned upon,

in the case of ROE, a team process for drafting the rules is absolutely necessary. Involving more players in the process reduces the chance that something will be missed or misunderstood. No one individual possesses the necessary knowledge or skills to perform the job in isolation. Rules of engagement involve many factors, from the legal to the technical, and from the tactical to the strategic.

Of the three services, the army judge advocate apparently can play the greatest role or exercise the most independence in drafting ROE, although this is not suggested as a regular course of action.²³³ Compared to the naval and air environments, the employment of army forces is understood more readily and the possible threats are less sophisticated. Because the air force and the navy possess a considerable amount of electronic equipment that advises them of the possible threat, the legal officer is far less capable of developing the various indications of possible hostile intent. Radar warning receivers' and other electronic warfare equipment's limitations and capabilities can be known only by the actual operators of such equipment. Therefore, the input from the operational or line officer in these services is absolutely critical.

The intelligence personnel of all three services will be able to provide information on a potential opponent's order of battle or weapons systems capabilities, battle tactics, and other indicators of intent. Therefore, their advice also should be obtained in helping to define possible hostile intent circumstances. Operational staff from the applicable headquarters should be part of the process so that the mission and concept of operations also can be considered.

When drafting ROE, the goal is for maximum clarity. Ambiguities in ROE result only in confusion. Possible delays while clarification is sought could cause casualties; otherwise, the unit or its personnel may overreact with unpleasant consequences. The ROE need to be presented logically and completely. Thoroughly drafted ROE will ensure a better understanding of the parameters of the rules and will aid in the memorization or application of the rules. Brevity is desired, but not at the expense of clarity or completeness. The United States Army's operational law handbook summarizes the goals of ROE drafting with the following five rules: (1) make the ROE clear and brief; (2) avoid excessively qualified language; (3) tailor the language to the audience; (4) separate the ROE by job description; and (5) ensure that the ROE are easily understood, remembered, and applied.²³⁴

²³¹ See, e.g., U.N. CHARTER art. 35(3) (prohibiting the employment of “methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment”); see also *id.* art. 55(1); art. 56(1) (providing “Works or installations containing dangerous forces, namely dams, dykes and nuclear electrical generating stations shall not be made the object of attack” even when no military objectives exist). Military objectives near such works also may not be attacked if the attack “may cause the release of dangerous forces from the works or installations and consequent severe losses among the civilian population.” *Id.*

²³² O'CONNELL, *supra* note 9, at 170.

²³³ Charles Bloodworth, in his unpublished paper, proposed a methodology for drafting ROE at the United States Army divisional level. His paper suggests that a staff team be composed of a team chief from the G3 operations or plans section, the division ammunition officer, the division aviation officer, the fire support coordinator, an engineer staff officer, an intelligence staff officer, the operation law attorney, “representatives of supporting services, especially the Air Force Tactical Air Control Party and the Navy/Marine Air and naval Gunfire Liaison Company (ANGLICO)” and coordination with the provost marshal and civil affairs units. Bloodworth, *supra* note 21, at 13.

²³⁴ OP. LAW HANDBOOK, *supra* note 22, at H-87.

Any discretionary action given to a commander should be indicated clearly. Ideally, ROE should not set out specific tactics. A commander needs to be able to employ his or her unit as freely as possible, as long as it is consistent with national, strategic, and tactical goals. Therefore, the ROE must not be "rudder orders."²³⁵

Wartime ROE should not restate the law of war. If the troops are uncertain about what the law prescribes, if training in the topic has been weak or infrequent, if control over the troops is limited, or if the commander desires to reinforce a particular aspect of the law of war,²³⁶ then ROE can provide a mechanism to make up for these deficiencies. Rules of engagement also should avoid repeating service doctrine, tactics, or procedures. In addition to duplicating other references, reiterating doctrine, tactics, or procedures would add nothing to the understanding about the particular limitations on the employment of force set by the NCA applicable to the conflict in question.

1. *Methodology for drafting.*—The following is a generic methodology for drafting ROE:

(a) review the warning order and the commander's estimate for the pending operation;

(b) review the existing treaties and any other relevant international agreements, especially when coalition forces are involved;

(c) master the ROE established at the higher levels;

(d) review the standard operating procedures (SOP) and determine what generic ROE are in effect in the tactical SOP, field SOP, and exercise SOP;

(e) review the OPLAN to determine the mission, the concept of operation, and any subunit missions;

(f) review all support plans involving the use of force—such as fire support and mine plans;

(g) review all coordinating instructions and control measures;

(h) review all the OPLAN annexes for relevant material; and

(i) obtain as much information as possible about the "threat," adversary equipment, and tactics.²³⁷

Having accomplished this, the drafter or reviewer then must consider whether the material specifies the right or obligation to respond in cases of self-defense and determine whether any specific limiting factors arise from national, strategic, or tactical requirements. The drafter or reviewer also should consider whether any limitations or restrictions are placed on the employment of certain weapons or against certain targets. In drafting ROE, the authors will want to consider whether anything to be proposed will raise a law of war issue requiring additional approval, coordination, or scrutiny.

2. *Review, Modification, and Dissemination.*—Once ROE are in place, they should be reviewed regularly to ensure that they remain current. Examinations should be conducted in accordance with directives from higher headquarters, if so required. Otherwise, a reassessment of the ROE should occur if the unit's role, mission, equipment, or operating area (the potential threat) change significantly. A systematic and thorough review is required. Input from subordinates who may have developed some experience with the ROE also would prove beneficial.

Even though ROE serve to guide commanders, ROE should be distributed to subordinates in as complete a form as possible commensurate with the security classification and on a "need to know" basis.²³⁸ When this is not possible, the commander needs to disseminate an abbreviated or unclassified compilation of the rules to the lowest level necessary. In the case of the army, base or perimeter security personnel for the other services, and soldiers on the front line who likely will be exposed to individual small arms fire or terrorist threats, clear and simple guidance should be provided on when they can fire in self-defense or in the protection of others. A common practice is to print the ROE on small cards.

The air force, on the other hand, probably will need to pass the ROE only to the pilots and air weapons controllers—that is, individuals most likely to engage the enemy. The author's experience in the Gulf War was that the complete ROE package was too comprehensive for the individual fighter pilots. They appreciated the legal officer who distilled the ROE to two small pages for their cockpit reference notebooks. The

²³⁵ Roach, *supra* note 2, at 52.

²³⁶ OP. LAW HANDBOOK, *supra* note 22, at H-85.

²³⁷ John Rolph, Lecture Outline, "Rules of Engagement (ROE)," INT'L L. Div., THE JUDGE ADVOCATE GENERAL'S SCHOOL, U.S. ARMY, 13TH OPERATIONAL LAW COURSE HANDBOOK, tab K-9 (on file in the International Law Division, The Judge Advocate General's School, U.S. Army, Charlottesville, Va.); *see also* OP. LAW HANDBOOK, *supra* note 22, at H-88.

²³⁸ OP. LAW HANDBOOK, *supra* note 22, at H-85.

navy's ROE for fighting ships needs to be disseminated only to the combat information center (CIC) personnel because all firing from the ship is controlled by a few principal officers. For special developments—such as visit, boarding, and search—something similar to the army's ROE will have to be produced.

The classification of the ROE will have to be considered in terms of their contents. If the compromising of key definitions—such as hostile intent—would reveal the unit's perception of the potential threat and the possible responses to a particular action by the enemy, then the ROE will have to be classified.

Troops need to train with realistic—if not the actual—ROE to develop the necessary familiarity with them. Such a procedure should expose any weakness or confusion with the rules. Waiting for a crisis situation, approaching hostile intent, to try and find the ROE and determine which rule actually governs would be too late. By that time, the unit may then find itself responding to an actual hostile act.

Rules of engagement are a matter of operations and command, not law. Therefore, ROE need to be disseminated through the operational chain of command, not the technical legal net. The operational legal advisors at each level of command will have a prime interest in the ROE, but all changes or requests for modification must emanate from the commander. The attorney's skill in crafting precise language, however, should be tapped in the preparation of such documentation or messages.

More comprehensive ROE packages cover a variety of situations. Authority may be granted to employ certain measures covered in certain rules and other measures may be reserved for higher headquarters or the NCA. These particular rules should be numbered clearly to ensure quick reference when seeking modification or approval. Ideally, draft messages or samples should be prepared ahead of time to enable a quick filling-in-of-the-blanks and transmission of the authorization request.²³⁹

In the area of procedures, ROE will benefit from advance preparation. The more forethought that goes into them, the more complete and efficient they should be. More situations will be covered, making the rules more workable. Therefore, the more time spent in drafting, reviewing, revising, and practicing ROE, the better.

VII. Conclusion

Captain Roach's plea for greater knowledge of ROE remains a valid goal. Recent events, however, have invalidated his 1983 criticism that ROE were known only by the classified documents custodian, were not well understood, and were neither clearly nor comprehensively written.²⁴⁰ That is not to say that more experience, practice, and analysis is not required.

Rules of engagement are critical documents pertaining to the conduct of operations by armed forces. They fulfill a necessary and important role in the regulation of the use of force in times of crisis and war. Such a regulation is a function of political control of democratic armed forces, but ROE also are tools for senior commanders. Successful operations and the protection of national interests are enhanced by appropriate ROE.

Rules of engagement are complicated because of the legal and nonlegal factors affecting the degree to which force can be brought to bear during times of peace, tension, and war. The legal factors applicable to ROE—namely the right of self-defense under international law, the laws of war, and, for domestic operations, the domestic laws pertaining to the use of force and aid to civil authorities—are complex matters. The nonlegal considerations have political and military rationales that also require particular expertise and understanding.

Therefore, qualified and capable operational legal advisors and warfighters must be a part of the ROE formulation process so that this very necessary adjunct to military operations serves the needs of not only the fighting personnel, but also the nation's interests and security.

²³⁹ Admiral Woodward, the Commander of the Falklands Task Group, described in his memoirs how he circumvented the chain of command to get the ROE changed so that H.M.S. *Conqueror* could engage the *Belgrano* while outside of the total exclusion zone. The Admiral mused, "[H]ow can I startle everyone at home into the required and early action?" He initiated a signal to the *Conqueror*, ordering her to attack, but at the same time "instituted the formal process" to have the ROE amended. He had his staff officer of operations contact the duty officer in Northwood, England, to explain the rationale for his actions and to "grease the skids" for he what hoped would happen. Mrs. Thatcher's war cabinet approved the amendment the next morning. WOODWARD, *supra* note 12.

²⁴⁰ Roach, *supra* note 2, at 52.

International Child Abduction Remedies

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Introduction

Child abduction and contested child custody cases are among the most difficult problems faced by a client and counsel. Child custody disputes that cross international boundaries pose the greatest risk and uncertainty. For a foreign spouse, the hindrance of distance and expense, fear of unfamiliar laws and practices, possible language difficulties, and a lack of ties to a foreign community present imposing obstacles. Compounding the difficulty is the increasing frequency with which these cases occur. As social and technological factors combine to create a high degree of international mobility, the potential for international child custody disputes soar. For the military practitioner, the potential to encounter these cases is increased further by the withdrawal from overseas bases. This article is designed to provide a practitioner with an abstract of the development and application of the law of international child custody disputes.

Historically, in the absence of effective international legal mechanisms child custody disputes were "settled" through child stealing. The parent willing to engage in the most aggressive conduct to obtain custody enjoyed victor's justice. Perhaps as a result of its proximity to the United States—combined with its traditional ties to other Commonwealth nations—Canada was particularly distressed by the absence of an international custody dispute resolution mechanism. Consequently, in 1976, Canada proposed the development of international law to reduce child stealing and retention abroad to the Hague Conference on Private International Law.¹ The result of this initiative was the 1980 Hague Convention on the Civil Aspects of International Child Abduction (Convention).² The United States ratified the Convention and implemented its

provisions through the International Child Abduction Remedies Act (ICARA) on July 1, 1988.³

Overview

The Convention's goal is to return children under sixteen years of age to the proper custodian in the proper jurisdiction for custody determination; to deter wrongful removal or retention of children by eliminating any tactical incentive to manipulate jurisdiction; and to ensure that rights of custody and access⁴ under the law of one contracting state effectively are respected in other contracting states. The Convention does not apply to judicial or administrative⁵ custody determinations and is only a mechanism for determining whether a child has been removed or retained wrongfully.⁶ The Convention leaves the determination of legal custody to the law of the contracting state—that is, a country that is party to the Convention—to which the child is returned. Furthermore, the Convention's remedies are in addition to other judicial or administrative remedies.⁷ In selected cases, a parent seeking the return of a child from the United States may find a better remedy in the Uniform Child Custody Jurisdiction Act (UCCJA).⁸ Other states may have similar domestic laws. Great care, however, must be exercised in selecting remedies, as will be illustrated.⁹

The "Elements" of a Convention Case

Despite its brief existence, the Convention has proven to be an efficient and effective mechanism to accomplish its stated goals. The Convention's effectiveness derives largely from its limited scope and the simplicity of its terms. The Convention is restricted to cases seeking the return of children under sixteen years that are habitually resident¹⁰ in a contracting state

¹The Hague Conference is an 100-year-old international organization of member governments whose permanent bureau is located at The Hague, Netherlands. The United States joined the Conference in 1964. 22 U.S.C. § 269g (1988).

²1980 Hague Convention on the Civil Aspects of Int'l Child Abduction, Oct. 25, 1980, 19 I.L.M. 1501 (Nov. 1980) (entered into force Dec. 1, 1983) [hereinafter Convention]. The text and list of states party are reprinted in 51 Fed. Reg. 10,498 (1986); FAM. L. REP., Reference List 122:001; MARTINDALE HUBBELL LAW DIRECTORY, LAW DIGESTS, vol. 18, pt. VII at 34 (1992).

³International Child Abduction Remedies Act, Pub. L. No. 100-300, codified at 42 U.S.C. § 11601 (West Supp. 1992); see *infra* notes 48-56 and accompanying text.

⁴"Right of access" is equivalent to the concept of visitation.

⁵Under the Convention, the terms "court" and "judicial authority" are used to identify both judicial and administrative bodies empowered to render decisions on abduction proceedings. The term "court" will refer to both unless otherwise indicated.

⁶See Convention, *supra* note 2, art. 3.

⁷*Id.* art. 29; see also International Child Abduction Remedies Act, 42 U.S.C. §§ 11601, 11603 (West Supp. 1992).

⁸UNIFORM CHILD CUSTODY JURISDICTION ACT, pt. 1, 9 U.L.A. 116-170 (1988) [hereinafter UCCJA].

⁹See *infra* notes 77-82 and accompanying text; see also *Tahon v. Duquette*, 613 A.2d 485 (N.J. 1992).

¹⁰"Habitually resident" is an important term of art; see *infra* notes 92-96 and accompanying text.

from another contracting state.¹¹ The abduction must have occurred on or after the effective date of the Convention.¹² The Convention does not apply to noncontracting states.¹³ The parent seeking custody should be prepared to show that the child was removed from his or her custody in breach of the laws of the state in which the child was habitually resident immediately before the removal, or that the child was retained wrongfully to prevent the exercise of custody rights as defined by the law of the state of the child's habitual residence.¹⁴ The Convention also allows a noncustodial parent to demand "rights of access,"¹⁵ to exercise visitation privileges, joint physical custody, or other child contact regimes. The right to access includes the right to take the child to a place other than the child's habitual residence.¹⁶

The Process of a Convention Case

The Convention requires each contracting state to establish a central authority to discharge the duties of the Convention.¹⁷ The United States central authority (CA) is the Department of State. Any person¹⁸ claiming that a child has been removed wrongfully or retained may apply to the CA of the child's habitual residence or the CA of any contracting state where the child may be.¹⁹ In the United States, the implementing act also allows direct petition to United States courts without

prior action by any CA.²⁰ The availability of direct petition in other countries is a matter of local law. The contents of the return request are straightforward and contain no special requirements beyond the listing of factual information.²¹ The Convention specifically eliminates the requirement for legalization or other formalities.²² Unlike United States domestic practice, no custody decree or order is required for a return application under the Convention.²³ An applicant should not delay filing a return request to obtain a custody order.²⁴ Timely requests are essential²⁵ because time determines whether a return is mandatory or permissive. An otherwise qualified request filed within one year of the abduction or wrongful retention invokes an absolute return obligation. After one year, however, the return obligation no longer is absolute. A court then may decline to order the return if the child has become settled in the new environment.²⁶

When the CA receives an application, it must take every appropriate measure to discover the child's location; prevent harm to the child or prejudice to the legal interests of the parties through provisional measures; and, if possible, secure the voluntary return of the child or other amicable resolution.²⁷ If a case cannot be resolved voluntarily, the CA is required to initiate or facilitate judicial or administrative proceedings to secure the return of the child or rights of access²⁸ and otherwise remove all obstacles to the child's return.

¹¹ Convention, *supra* note 2, art. 4.

¹² The effective date for the United States entering the Convention was July 1, 1988.

¹³ *Moshen v. Moshen*, 715 F. Supp. 1063 (D. Wyo., 1989); *Adkins v. Antapara*, 1992 Tenn. App. LEXIS 996 (Dec. 17, 1992). If the child habitually is resident in a noncontracting state and removed to the United States, the injured parent should look to the UCCJA; *see, e.g., Middleton v. Middleton*, 314 S.E.2d 362 (Va., 1984); *Ben-Yehoshua v. Ben-Yehoshua*, 154 Cal. Rptr. 80 (1979); *L.H. v. Youth Welfare Office*, 568 N.Y.S.2d 852 (1991).

¹⁴ Convention, *supra* note 2, art. 3.

¹⁵ *Id.* ch. IV.

¹⁶ *Id.* art. 5, 21.

¹⁷ *Id.* art. 6.

¹⁸ The Convention's remedies are available to any person, institution, or other body in loco parentis as expressed in the law of the child's habitual residence; *see, e.g., Youth Welfare Office*, 568 N.Y.S.2d at 852. For simplicity the term "parent" will be used to indicate any person or body entitled to control of the child unless otherwise indicated.

¹⁹ Convention, *supra* note 2, art. 8.

²⁰ 42 U.S.C. § 11603(b) (West Supp. 1992).

²¹ For applicants in the United States, *Form DSP-105* is available from the CA. A sample request can be found at 51 Fed. Reg. 10494. For countries using French for official business, an English and French version can be found at 19 I.L.M. 1516 (1980).

²² Convention, *supra* note 2, art. 23.

²³ Articles 3 and 5a of the Convention eliminate any requirement for a prior court order and clearly contemplate cases of wrongful removal or retention that precede the filing of any divorce proceedings; *see Peter H. Pfund, The Hague Convention on International Child Abduction, The International Child Abduction Remedies Act, and the Need for Availability of Counsel for All Petitioners*, FAM. L. Q., Spring 1990, at 35, 40.

²⁴ The Convention's scheme anticipates that any doubts concerning custody can be resolved using the Convention's Article 15 procedure. Any existing orders should be attached to the request; *see* Convention, *supra* note 2, arts. 3, 14.

²⁵ *Tahan v. Duquette*, 613 A.2d 486 (N.J. 1992).

²⁶ Convention, *supra* note 2, art. 12.

²⁷ *Id.* art. 27.

²⁸ *Id.* art. 7f.

The scope of assistance the CA renders in judicial and administrative proceedings will vary according to the law and social philosophy of the individual contracting state.²⁹ As a minimum, the CA will provide information and assistance to locate the child and facilitate rapid judicial or administrative action. The Convention is founded on the principle that the interests of abducted children are served best by returning them as quickly as possible to their customary environments.³⁰ In support of that principle, Article 2 of the Convention requires the use of "the most expeditious procedures available." Article 14 authorizes courts and authorities of the requested state to take direct notice of the law and decisions—including opinions determining that the removal or retention was wrongful—of the state of the child's habitual residence without procedural formalities. The CA is required to conduct an inquiry into any delay beyond six weeks from the commencement of proceedings and provide an explanation to the requesting state or applicant.³¹

Exceptions to the Return Obligation

The Convention was written to severely curtail the reasons to refuse returning a child under an otherwise qualified application. Return is not required if the proceeding commenced more than one year after the wrongful removal or retention and the court determines that the child is settled in the new environment.³² Under the language of Article 12, the court still may order the child's return—under principles of local law or, perhaps to further the Convention's deterrent effect; but the court no longer would be under a treaty obligation to do so.

Return also is not required if the petitioner was not actually exercising custody rights at the time of the removal or retention.³³ "Custody rights" are defined by the law of the state of habitual residence.³⁴ Additionally, return is not required if the respondent parent can show that the petitioner consented or

acquiesced in either the removal or retention.³⁵ For the parent attempting to invoke the Convention, this exception reinforces the importance of promptly submitting the application before otherwise ambiguous events and communications can be construed as consent or acquiescence under the law of another, possibly undetermined, state.

Article 13(b) is the focus of most litigation applying the Convention. A court is not required to order a return if the respondent establishes that a grave risk exists that return will result in physical or psychological harm to the child or otherwise place the child in an intolerable situation. The negotiating history indicates that this provision was not intended to provide an opportunity to pass judgment on the home, community, or school opportunities of the habitual residence. Rather, this exception was intended to be limited to matters of sexual assault or other forms of severe problems.³⁶ For applications in United States courts, the ICARA places a "clear and convincing evidence" burden of proof on the respondent.³⁷ Article 13(b) also allows a court to decline a return when the child is sufficiently mature and objects to the return. As is true of all the Convention exceptions, the child's objection is not mandatory and may be given little weight if the court suspects the child's expression is the product of immature judgment or undue influence.³⁸ Even though this provision has been criticized by several commentators as subject to abuse by abducting parents, it remains a traditional court function. Deleting this exception would open the possibility for children who are legitimately able to make their own decisions being returned to other countries against their wills.³⁹

Article 20 provides another exception on the basis of protecting human rights and fundamental freedoms. The negotiation of this clause was hotly contested and nearly scuttled the entire Convention.⁴⁰ In the end, the clause narrowly was adopted to provide a public policy exception to the Convention's return obligation. This exception is not well developed

²⁹ See *infra* text accompanying note 47.

³⁰ 3 Hague Conference on Private International Law, Acts and Documents of the 14th Session, Child Abduction 9 (1982).

³¹ Convention, *supra* note 2, art. 11.

³² *Id.* art. 12.

³³ *Id.* art. 13a.

³⁴ Friedrich v. Friedrich, No. 92-3117, 1993 U.S. App. LEXIS 931 (6th Cir. Jan. 22, 1993).

³⁵ Convention, *supra* note 2, art. 13a.

³⁶ See Elisa Perez-Vera, Conference Reporter, 3 Hague Conference on Private International Law, Acts and Documents of the 14th Session, Report at 461-2; see also, Pfund, *supra* note 23, at 35.

³⁷ 42 U.S.C. § 11603(e)(2)(A) (West Supp. 1992).

³⁸ Legal Analysis of the Hague Convention on International Child Abduction, 51 Fed. Reg. 10,494, 10,503-5 (1986) [hereinafter Legal Analysis].

³⁹ Although not a Convention or an ICARA case, Polovchak v. Meese, 774 F.2d 731 (7th Cir. 1985), provides an excellent study of a court's consideration of the wishes of a child in a custody dispute.

⁴⁰ Perez-Vera, *supra* note 36, at 461-62; see also Pfund, *supra* note 23, at 41.

in the case law,⁴¹ but review of the drafter's statements indicates that Article 20 was intended to be applied restrictively. Even its placement as the last article of the chapter was intended to emphasize its limited scope. A refusal to return under Article 20 must be based on a legal prohibition founded in the law of the requested state and not on the court's judgment of the merits of the political or social system of the child's habitual residence.⁴² The United States ratified the Convention with this understanding of Article 20⁴³ and signaled support for the limited interpretation by applying the clear and convincing evidence burden of proof in the implementing act.⁴⁴

The existence of a custody decree obtained by the respondent in any state other than the child's habitual residence provides no basis for an exception to the Convention's return obligation.⁴⁵ This provision is designed to strengthen the deterrent effect of the Convention by removing a major tactical advantage of abduction. Furthermore, this provision buttresses the Convention's goal of prompt return to the jurisdiction best suited to determine the merits of custody issues. Article 17, however, permits a court to take into account the facts and reasons underlying an existing custody decree when they are relevant to the Convention's provisions.

United States Implementation

Although by its terms the Convention is self-executing, the United States elected to implement the Convention through enabling legislation.⁴⁶ The principal purpose of the ICARA was to ensure the rapid and smooth implementation of the Convention by resolving jurisdictional, evidentiary, and privacy issues peculiar to the United States federal and state legal system. As a result of the ICARA, many issues that normally would require protracted litigation were resolved on the effective date of the Act. A further benefit of the ICARA was eliminating the approximately fifty potentially different glosses on the Convention's terms. In a major departure from general domestic law, the ICARA establishes concurrent original

jurisdiction in state and United States district courts for actions arising under the Convention.⁴⁷ Federal jurisdiction lends an important prestige element to the United States support for the Convention from the international point of view. Concurrent jurisdiction also allows the petitioning parent a reasonable choice of forum. The majority of reported cases are filed in state court. Relatedly, section 11603(b) specifies that the location of the child at the filing of the petition determines the venue. This provision destroys another tactical advantage of the abducting parent by restricting the ability of the respondent to manipulate the forum by moving the child or other stratagems.⁴⁸

Sections 11606 and 11608 grant the United States CA wide authority to access, collect, and maintain information from a variety of state and federal sources including the National Crime Information Center (NCIC) and the Federal Parent Locator Service (FPLS).⁴⁹ The United States CA also may release information without privacy restrictions to locate a child or abducting parent in the United States.

Each CA is required to bear its own costs and taxing administrative costs against applicants or requesting states is prohibited.⁵⁰ The United States ratified the Convention subject to a reservation under Articles 26 and 42. As a result, the United States is not bound for any litigation or transportation costs associated with Convention proceedings. The expense of transportation, communication, and legal services can form a substantial barrier for a foreign petitioner. Unlike many countries with comprehensive legal aid programs, legal aid in the United States generally is unavailable for civil cases. The CA makes an effort to locate pro bono counsel and otherwise assist in the referral process.⁵¹ The Convention permits the taxing of costs to the respondent, measured by the amount required to restore the applicant to the financial position he or she would have been in had no abduction or retention occurred and the expense of returning the child to the petitioner.⁵² To compensate for the lack of legal aid and respond to complaints from other CAs, the ICARA changed the taxing of

⁴¹ *Tischendorf v. Tischendorf*, 321 N.W.2d 405 (Minn. 1982).

⁴² A.E. Anton, *The Hague Convention on International Child Abduction*, 30 I.C.L.Q., July 1981, at 537, 551-2; see also, Perez-Vera, *supra* note 36, at 461-62; Pfund, *supra* note 23, at 41.

⁴³ Legal Analysis, *supra* note 38, at 10503-5035.

⁴⁴ 42 U.S.C. § 11603(e)(2)(A) (West Supp. 1992).

⁴⁵ Convention, *supra* note 2, art. 17.

⁴⁶ 42 U.S.C. § 11601 (West Supp. 1992).

⁴⁷ *Id.* § 11603(a).

⁴⁸ Compare *David S. v. Zamira S.*, 574 N.Y.S.2d 429 (1991) with *Friedrich v. Friedrich*, No. 92-3117, 1993 U.S. App. LEXIS 931 (6th Cir. Jan. 22, 1993).

⁴⁹ See 42 U.S.C. § 301 (1988).

⁵⁰ Convention, *supra* note 2, art. 26. This provision is captured in 42 U.S.C. § 11607(a) (West Supp. 1992).

⁵¹ Summary Minutes, Forty-second meeting of the Secretary of State's Advisory Committee on Private International Law, May 4, 1990, at 9.

⁵² Convention, *supra* note 2, art. 26.

costs from permissive to mandatory "unless the respondent establishes that such an order would be clearly inappropriate."⁵³

The United States reservation is nonreciprocal.⁵⁴ Consequently, United States applicants in foreign countries may receive the benefit of comprehensive funding of Convention cases unless that country also has exercised the reservation. In some foreign contracting states, the CA may act as the legal representative of the applicant for all purposes under the Convention.

Finally, section 11604 provides authority for whatever protective measures are available under the law of the state where the child is located. The CA, either directly or with the help of state child welfare agencies, may require respondents to post bonds or other forms of security and otherwise protect children and prevent further removals. As further protection from tactical maneuvering, section 11603(g) includes a full-faith-and-credit requirement to foreclose the necessity for expensive and dilatory relitigation in various forums.

In the first fifteen months that the Convention was in effect in the United States, the following requests were made: seventy-one requests for CA action; thirty-two requests for return from the United States, thirty-five requests to locate and return children to the United States; and four requests for access arrangements.⁵⁵ As of 30 September 1991, the number of requests had risen to 335 requests for return from the United States and 348 requests for return to the United States. Two hundred sixty-two of these cases occurred in the first nine months of 1991.⁵⁶ In addition to the dramatic rise in the number of cases, the efficacy of the Convention is confirmed by seven new nations becoming parties to the Convention in the last year.⁵⁷

The Convention, the ICARA, and the UCCJA

The UCCJA is the linchpin of multijurisdiction child custody law in the United States. Even though fifty states have adopted the UCCJA with some variations,⁵⁸ the UCCJA has no federal jurisdiction component.⁵⁹ Although the UCCJA was designed for domestic cases, it also applies to international cases. The drafters of the UCCJA determined that the basic policy of avoiding jurisdictional conflict and multiple litigation is as strong, if not stronger, when children are moved back and forth from one country to another by parents engaged in a custody dispute.⁶⁰ The drafters' commentary also clarifies that a foreign state's procedural and substantive custody law need only reflect that notice was given and an opportunity for a hearing occurred. The foreign court is not required to have jurisdiction under section 3 of the UCCJA; it only needs to have jurisdiction under its own law.⁶¹

The UCCJA establishes a mechanism to decrease jurisdictional conflicts in custody cases.⁶² The preferred basis for jurisdiction under the UCCJA is the child's home state, conceptually similar to habitual residence, but with important differences. Consequently, the structure and policies of the UCCJA and the Convention are complementary and not competitive. Although neither the Convention nor the UCCJA provides a source of substantive child custody law, they share the goal of deterring the abduction of children, although differing in scope and application.

The goals of the Convention are limited to determining whether a child has been removed wrongfully or retained and to ensure that rights of custody and access under the law of one contracting state effectively are respected in the other contracting states.⁶³ Unlike the Convention, the UCCJA is phrased broadly and allows a court to enforce or modify a valid custody decree if it finds that it has jurisdiction. Under the UCCJA, a court can exercise jurisdiction based on the fol-

⁵³ 42 U.S.C. § 11607(b)(3) (West Supp. 1992).

⁵⁴ Legal Analysis, *supra* note 38, at 32.

⁵⁵ Pfund, *supra* note 23, at 47.

⁵⁶ Department of State Statistical Report, 18 Fam. L. Rep. (BNA) 1112, July 1, 1992.

⁵⁷ Currently 26 nations are contracting states. The treaty was effective on July 1, 1988, between the United States and the following countries: Australia, Canada, France, Hungary, Luxembourg, Portugal, Spain, Switzerland, and the United Kingdom. The treaty became effective between the United States and the following countries on the dates indicated: Austria (Oct. 1, 1988); Norway (Apr. 1, 1989); Sweden (Jun. 1, 1989); Belize (Sep. 1, 1989); Netherlands (Sep. 1, 1990); Germany (Dec. 1, 1990); Argentina (June 1, 1991); Denmark (July 1, 1991); New Zealand (Oct. 1, 1991); Mexico (Oct. 1, 1991); Ireland (Oct. 1, 1991); Israel (Dec. 1, 1991); Yugoslavia (Dec. 1, 1991); Ecuador (Apr. 1, 1992); Poland (Nov. 1, 1992); Burkina Faso (Nov. 1, 1992). Note that the Convention does not apply to abductions occurring prior to the effective date.

⁵⁸ UCCJA, *supra* note 8, at 115.

⁵⁹ *Thompson v. Thompson*, 484 U.S. 174 (1988).

⁶⁰ National Conf. of Comm'rs on Uniform State Laws, Comment to UCCJA, *supra* note 8.

⁶¹ UCCJA, *supra* note 8, § 23.

⁶² *Id.* § 3.

⁶³ Convention, *supra* note 2, art. 3.

lowing preferential order: the child's home state;⁶⁴ the best interests of the child due to significant connections with the jurisdiction; presence in the state and an emergency exists due to abandonment, abuse or neglect; or, finally, because other states have refused jurisdiction.⁶⁵ As a result of its broad language and flexible terms, the UCCJA can be used when the Convention does not apply. Unfortunately, the UCCJA's broad language also is susceptible to varying interpretations that prevent uniform application and allow a court to indulge in a preference for its own initial jurisdiction that substitutes the best interest of the child standard for the proper jurisdictional inquiry. These problems, in turn, tend to promote child abduction and forum shopping by the abducting parent to gain the kind of tactical advantage both the UCCJA and the Convention were designed to eliminate. Another disadvantage of the UCCJA is the necessity to prove subject matter jurisdiction⁶⁶ and satisfy the notice and hearing due process requirement.⁶⁷ In the case of foreign decrees and orders, these requirements may pose a significant procedural obstacle and provide further opportunity for a court to substitute its own jurisdiction.

The UCCJA is a unilateral law of the individual states. It is reciprocal among the states, but confers no power to compel another country to reciprocate. For parents from noncontracting countries, the UCCJA is the weapon of choice to regain custody, provided they already have custody orders or decrees and know the locations of the children or abducting parents. Unlike the Convention, the UCCJA presumes the existence of an order or decree. It also lacks a mechanism to assist in locating the abducting parent or the child.

The Parental Kidnapping Prevention Act (PKPA) allows the use of the Federal Parent Locator Service.⁶⁸ A state court in the United States can enforce custody or visitation rights against a parent located in the United States but it cannot order a parent outside the United States to return a child to a parent in the United States. In addition to possible application to a greater number of foreign countries, the UCCJA also may apply to a broader range of children than the ICARA. The Convention and the ICARA cease to apply when a child reaches age sixteen.⁶⁹ Under the UCCJA, the upper age limit

varies between eighteen to twenty-one years.⁷⁰ Unlike the Convention, the UCCJA has no specific time to bring an action.

The UCCJA and Noncontracting States

The case of *Adkins v. Antapara* provides a useful illustration of successfully using the UCCJA to return children to a noncontracting state.⁷¹ Mr. and Mrs. Falco lived in Panama with their two children. Both children were born in Panama. Mr. Falco was a resident and citizen of Panama and Mrs. Falco was a United States citizen employed by the United States Army. Mrs. Falco decided that Panama was unsafe and returned to Tennessee with the two children. She did not tell her husband of her plans or that she had arranged a transfer of employment to Fort Ritchie, Maryland.

On January 17, 1992, Mrs. Falco flew to her mother's home in Tennessee and six days later filed a petition for custody in Tennessee court. Meanwhile, Mr. Falco petitioned for custody in the juvenile court of Panama. The court granted him custody and issued an order requiring Mrs. Falco to return the children to Panama. Mr. Falco then moved to dismiss the Tennessee proceedings, asserting that under the Tennessee UCCJA the trial court did not have jurisdiction and, if it did, the court should decline to exercise it. The trial court granted his motion and Mrs. Falco appealed asserting that the UCCJA's "home state" standard did not apply internationally and that the best interest of the children demanded that Tennessee exercise jurisdiction.

The appellate court affirmed the use of the home state analysis to decide jurisdiction between a state and a foreign country.⁷² This principle was required to uphold the fundamental policy of the UCCJA. The court then turned to the UCCJA due process issue, finding that the Panamanian order was the equivalent of the *ex parte* temporary custody decree Mrs. Falco had obtained in Tennessee. Mr. Falco had no more notice or opportunity to be heard in Tennessee than she did in Panama. The court found significance in the Panamanian order's not purporting to be a final determination. The Panamanian order merely required Mrs. Falco to return the

⁶⁴UCCJA, *supra* note 8, § 2(5). The UCCJA defines "home state" as the state in which the child lived with his or her parents for the six consecutive months immediately preceding the action unless the child is less than six months old—then the state in which the child lived since birth with his parents.

⁶⁵*Id.* § 3(a).

⁶⁶*Ben-Yehoshua v. Ben-Yehoshua*, 91 Cal. App. 3d 259 (1979).

⁶⁷For an excellent illustration of the difficulty in applying the UCCJA to an international case, see *Horlander v. Horlander*, 579 N.E.2d 91 (Ind. 1991).

⁶⁸Parental Kidnapping Prevention Act of 1980, Pub. L. No. 96-611, 94 Stat. 3568-73 (1980) (codified as amended in scattered sections of 28 U.S.C. and 42 U.S.C.) [hereinafter PKPA].

⁶⁹Convention, *supra* note 2, art. 4.

⁷⁰UCCJA, *supra* note 8, § 21 at 324 (comment).

⁷¹*Adkins v. Antapara*, 1992 Tenn. App. LEXIS 996 (Tenn. Ct. App. Dec. 17, 1992).

⁷²*Id.* at 9.

children so that a permanent custody hearing could be held and, in doing so, provided her notice. Both the notice requirement and the status of the decree would be irrelevant under the Convention. How the court would have reacted if the Panamanian order had been final is speculative. The court placed on Mrs. Falco the burden of showing that she would be denied due process in Panama or that Panama would not exercise jurisdiction in accordance with the policies embodied by the UCCJA. Having established firmly the principles of the UCCJA, however, the court then destroyed much of the effect of its ruling by specifically disclaiming any obligation to order the return of children to any foreign nation if the petitioner can establish that the legal system of the home country will not accord due process when ruling on custody.⁷³ The majority did not address the Convention, nor did the court determine how much process was due, leaving the matter open for case-by-case litigation and undercutting the deterrent purpose of the UCCJA.

The case of *In re Moshen*⁷⁴ illustrates an unsuccessful attempt to gain custody under both the Convention and the UCCJA. The Moshens were married in the United States in 1987. That year, they moved to Bahrain and their daughter was born there. In May of 1989, the Moshens came to the United States to visit Mrs. Moshen's parents in Wyoming. While in Wyoming Mrs. Moshen declined to return to Bahrain and refused to allow her husband to visit the child.

Mr. Moshen filed an ICARA action for the return of his daughter in federal district court. His complaint alleged that he had a valid divorce and custody decree from a Bahrainian court.⁷⁵ The district court held that Mr. Moshen was entitled to no relief under the ICARA because Bahrain is not a signatory to the Convention. The Court refused to accept the petitioner's position that the requirements of the ICARA stand independent of the Convention. The court implicitly agreed that, under the facts presented, the daughter wrongfully was removed or retained, but held that the ICARA provides no substantive law or rights; it only empowers courts to determine rights under the Convention.⁷⁶ Adding to his complete defeat, the petitioner failed to plead and prove the requirements of UCCJA, section 23 (notice and due process), thereby destroying his opportunity for custody or access.⁷⁷ The court virtually sneered at the Bahraini order based on its opinion of the judicial process of that country yet, if Bahrain had signed the Convention, return would have been mandatory under the same facts.

While *Moshen* teaches counsel to take care to prove the requirements of the UCCJA when the Convention does not apply, *Sheikh v. Cahill*⁷⁸ demonstrates the result of ill-considered selection of remedies. The parties were married in 1978 in Pakistan. Later that year, they moved to New York where their son, Nadeem, was born in April 1980. In March 1981, the father, Mr. Sheikh, took the child to Pakistan without Mrs. Cahill's (the mother) consent. Mrs. Cahill abducted the child from Pakistan, placed him with relatives in Ireland, and returned to New York. Thereafter, the parties engaged in various inconclusive or incomplete court proceedings in New York. The mother ultimately returned to Ireland.

Three years later, Sheikh served Cahill with papers for a divorce. Cahill returned to New York with her son Nadeem, but did not answer the divorce papers. An uncontested divorce was ordered in July 1984, with custody of Nadeem in both parties. In the fall of 1984, Cahill sought to reopen the divorce. She claimed lack of service or jurisdiction and that she had been led to believe a reconciliation was in progress. Eighteen months of additional litigation followed. Sheikh did not see the child during this period. In June 1986, the New York court issued an order giving physical custody of Nadeem to Cahill with supervised visitation for Sheikh.⁷⁹

In July 1986, Cahill took Nadeem to London, England, without the knowledge or consent of Sheikh. Sheikh discovered their location in November 1988. Although the United States and England were signatories to the Convention as of July 1, 1988, Sheikh did not file a Convention application. He elected instead to file a wardship proceeding in English court and submitted himself to the jurisdiction of the English court. Cahill prevailed in the wardship proceeding with visitation rights for Sheikh. When Mr. Sheikh returned to New York, the New York court denied Sheikh's custody request and vacated its warrant for Cahill's arrest because of the English court's exercise of jurisdiction in accord with the UCCJA.⁸⁰

Eventually Sheikh was granted extended summer visitation by the English court. At the end of the first summer visitation, Sheikh refused to return Nadeem to England and petitioned the New York court for custody under the 1986 New York decree that Cahill had violated. Cahill secured an order

⁷³ *Id.* at 12.

⁷⁴ *Moshen v. Moshen*, 715 F. Supp. 1063 (D. Wyo., 1989).

⁷⁵ *Id.* at 1064.

⁷⁶ *Id.* at 1065.

⁷⁷ *Id.* at 1065, n.2.

⁷⁸ 546 N.Y.S.2d 517 (1989).

⁷⁹ *Id.* at 519.

⁸⁰ *Id.* at 520.

from the English court, finding that Nadeem wrongfully was retained within the meaning of the Convention. The New York court declined to accept Sheikh's argument that the English order was a nullity based on the earlier New York order. It determined that by submitting to the jurisdiction of the English court, Sheikh destroyed his Convention rights and wiped out the earlier New York order. The court found that Nadeem was under sixteen years of age and that London was his habitual residence. As a result, the Convention was applicable.⁸¹ Sheikh then claimed that Nadeem's return would expose the child to grave risk of physical or psychological harm or otherwise place him in an intolerable situation. He further claimed that Nadeem objected to his return.⁸² In a model application of the Convention standards, the court then applied the ICARA clear and convincing evidence burden of proof to Sheikh's Article 13 exceptions and found them to be without merit. The court found no evidence of grave risk to Nadeem. The court conducted an *in camera* interview of Nadeem and determined that he had not attained the age and maturity to take account of his views. The court closed its opinion by noting that Nadeem had been in the United States for less than a year and that his return therefore was required. Finally, the court reminded the parties that it was not making a ruling on custody and that any such ruling was for the court in England in accordance with Article 19 of the Convention.⁸³ The case of *Sheikh v. Cahill* is an excellent illustration of the proper application of the Convention by a state court and the danger of selecting a remedy without careful consideration of the requirements and limitations of the Convention.

An Illustrative Convention Case: "Wrongful Removal" From the "Habitual Residence"

In December, 1989, Emanuel Friedrich, a German national, married Jeana Friedrich, a United States citizen and soldier in the United States Army assigned to Bad Aibling, Germany. Their son, Thomas, was born at Bad Aibling on December 29, 1989. The Friedrich marriage was a rocky one and the couple underwent several informal separations. During the separations, Mr. Friedrich and his parents maintained custody of Thomas.

Mrs. Friedrich took Thomas to the United States for a ten-day visit in May 1991, and reunited with her husband when she returned to Germany. On July 27, 1991, the Friedrichs

had a heated argument and Mr. Friedrich ordered Mrs. Friedrich to leave their apartment. She left with Thomas, removed her possessions, and moved into base transient quarters. Over the next several days, she met with Mr. Friedrich and Mr. Friedrich visited with Thomas for several hours. On August 1, 1991, Mrs. Friedrich, without Mr. Friedrich's knowledge, consent, or permission, took Thomas to the United States and filed for divorce and custody in Ohio. She was granted temporary custody and the court ordered that Thomas not be removed from Ohio. Mr. Friedrich discovered that Thomas had been removed on August 3, 1991, and filed for, and received, a custody order in German court. Each party claimed a failure to receive notice of the other's proceeding. In the interim, Mrs. Friedrich was discharged from the United States Army.

On September 23, 1991, Mr. Friedrich filed a Convention petition in federal district court.⁸⁴ The district court denied his petition on the grounds that when he ordered Mrs. Friedrich out of the apartment, he severed his custody rights under the Convention.⁸⁵ Mr. Friedrich appealed.⁸⁶

The circuit court reversed and outlined the law concerning several important principles of the Convention. The court emphasized that a United States district court has the authority to determine the merits of an abduction claim, but may not adjudicate the merits of the underlying custody claim.⁸⁷

It is important to understand that "wrongful removal" is a legal term strictly defined in the Convention. It does not require an ad hoc determination or a balancing of the equities. Such action by a court would be contrary to a primary purpose of the Convention: to preserve the status quo and to deter parents from crossing international boundaries in search of a more sympathetic court.⁸⁸

Once an applicant shows by a preponderance of evidence that the removal was wrongful under the law of the habitual residence, the burden shifts to the respondent to show by clear and convincing evidence that one of the Convention exceptions applies. The circuit court rejected the district court's theory that "Thomas's habitual residence was 'altered' from

⁸¹ *Id.*

⁸² Convention, *supra* note 2, art. 13.

⁸³ *Cahill*, 546 N.Y.S.2d at 177-78.

⁸⁴ *Friedrich v. Friedrich*, No. 91-00651, slip op. (D. Ohio Jan. 10, 1992).

⁸⁵ Convention, *supra* note 2, art. 3.

⁸⁶ *Friedrich v. Friedrich*, No. 93-3117, 1993 U.S. App. LEXIS 931 (6th Cir. Jan. 22, 1993).

⁸⁷ *Id.* at *6.

⁸⁸ *Id.* at *6-7.

Germany to the United States when Mr. Friedrich set some of Thomas's belongings in the hallway" during the argument in July, 1991.⁸⁹ The court also rejected the theory that Mr. Friedrich terminated his custody rights when he expelled his wife and Thomas from the apartment.⁹⁰ The circuit court remanded the question of whether Mr. Friedrich was exercising custody rights to the district court with explicit instructions to do so under principles of German custody law.⁹¹

The court noted that little United States case law could be found to define "habitual residence" and set out to define the term by stating that "the court must focus on the child, not the parents, and examine past experience, not future intentions."⁹² Habitual residence is to be determined by the facts of the case and is not to be confused with domicile or citizenship. The court adopted the approach of a leading English case, that no real distinction exists between ordinary residence and habitual residence.

It is greatly to be hoped that the courts will resist the temptation to develop detailed and restrictive rules as to habitual residence, which might make it as technical a term of art as common law domicile. The facts and

circumstances of each case should continue to be assessed without resort to presumptions or pre-suppositions.⁹³

A person can have only one habitual residence.⁹⁴ Habitual residence can be changed only by a change in geography and the passage of time—not by changes in parental affection and responsibility.⁹⁵ The court warned that the use of any standard that focused on the parents or their future intentions would render the Convention "meaningless."⁹⁶

Conclusion

This article has provided a brief analysis of the major points of the Hague Convention on the Civil Aspects of International Child Abduction. Armed with an understanding of how the Convention works, an attorney can reduce the uncertainty surrounding international child custody cases substantially. The possible permutations in child custody cases are limitless and no legal mechanism—national or international—ever will be able to respond to all situations. Nevertheless, the Convention is a major improvement in deterring and resolving international child custody disputes.

⁸⁹ *Id.* at *9.

⁹⁰ *Id.*

⁹¹ *Id.* at *11-12.

⁹² *Id.* at *9.

⁹³ *In re Bates*, No. CA 122.89, High Court of Justice, Family Divisional Ct., Royal Court of Justice, United Kingdom (1989) (quoting DICEY AND MORRIS, *THE CONFLICT OF LAWS* (11th ed., n.d.)).

⁹⁴ *Friedrich v. Friedrich*, No. 92-3117, 1993 U.S. App. LEXIS *11 (6th Cir. Jan. 22, 1993).

⁹⁵ *Id.* at *13.

⁹⁶ *Id.* The court also reminded practitioners that a United States military base is not sovereign territory of the United States, citing *Dare v. Secretary of Air Force*, 608 F. Supp. 1077, 1080 (D. Del. 1985). In the context of this case, the removal of Thomas to the Bad Aibling installation was irrelevant to the determination of habitual residence.

USALSA Report

United States Army Legal Services Agency

Clerk of Court Notes

Waiving Appellate Review

A clerk of court's note appearing in the December 1992 issue of *The Army Lawyer* advertised the availability of a handbook for staff judge advocate offices entitled, *The Clerk*

of Court's Notes on Post-Trial Administrative Processing of Courts-Martial issued at the October 1992 Judge Advocate General's Continuing Legal Education Workshop at The Judge Advocate General's School. This handbook also was reprinted in Trial Counsel Assistance Program Memorandum #83, February 1993. An alert judge advocate has discovered an error in the handbook.

Delete the guidance at the top of page two of the handbook stating waivers of appellate review should not be *executed* before the convening authority takes action. This advice was based on the Court of Military Appeals' decision in the case of *United States v. Hernandez*, 33 M.J. 145 (C.M.A. 1991). We now have been reminded that Rule for Courts-Martial 1110(f)(1), as changed by Executive Order No. 12767, dated 27 June 1991 (Change No. 5, *Manual for Courts-Martial, United States* (1984)), provides that "an accused may sign a waiver of appellate review at any time after the sentence is announced." Even if signed earlier, neither the accused nor the accused's counsel should submit the waiver until after the convening authority's action is known.

Help Wanted from Trial and Defense Counsel: Overseas Travel of Witnesses

In addition to the requirements of paragraph 18-16.1, *Army Regulation 27-10, Legal Services: Military Justice* (22 Dec. 1989), trial and defense counsel need to be aware of three important items when the Office of the Clerk of Court, United States Army Judiciary, arranges civilian witness travel for testimony in overseas Article 32 investigations and courts-martial.

First, this office procures the airline ticket through a government contract travel service. The witness should not purchase his or her own ticket and may not be reimbursed fully for a ticket bought at excessive cost.

Second, a family member or friend cannot accompany the witness at government expense unless the overseas command authorizes funds for the travel of an escort—for example, when the witness is a child or handicapped.

Third, if a family member or friend nevertheless chooses to travel with the witness at personal expense, this office can make the necessary reservations, but cannot purchase the ticket for the traveler.

Counsel initially contacting the witness to determine availability must inform the witness of these three items. Otherwise, the witness may buy tickets before this office can establish contact, and the witness consequently may be faced with a loss of funds through incomplete reimbursement or a cancellation fee. Witnesses who lose money are not friendly to either party to the litigation.

ACMR Published Opinions Available on LAAWS Bulletin Board

In April 1993, a new "ACMR Conference," was established on the Legal Automation Army-Wide System Bulletin Board

System (LAAWS BBS). Its purpose is to make the ACMR opinions selected for publication available to the military bench and bar as soon as they are released (transmitted electronically) to West Publishing Company and Mead Data Central. In addition to the opinions, notices and suggestions from the Clerk of Court occasionally may be posted.

Membership in the ACMR Conference is open to all registered users of the LAAWS BBS. Each opinion will be stored in three formats—Enable 4.0, WordPerfect 5.1, and ASCII—in a single file bearing the appellant's surname with an .EXE extension—for example, SMITH.EXE. After downloading the .EXE file to a personal computer and changing from telecommunications to word processing, typing the filename SMITH or SMITH.EXE will cause the following three new files to be extracted: SMITH.WPF; SMITH.WP; and SMITH.TXT. The ACMR's opinions are prepared using Wordperfect 5.1. The other two versions should be identical except for format markers.

The LAAWS Office, rather than the Clerk of Court, is in the best position to help users resolve any technical problems encountered. The Clerk of Court, however, is interested in knowing whether this service is useful and how it may be improved for you. Contact William S. Fulton, Jr., at DSN 289-1888.

Court-Martial Processing Times

The table below shows the average processing times Armywide for general courts-martial and bad-conduct discharge special courts-martial for the second quarter of Fiscal Year 1993.

General Courts-Martial

Records received by Clerk of Court	263
Days from charging or restraint to sentence	50
Days from sentence to action	64
Days from action to dispatch	7
Days from dispatch to receipt by the Clerk	10

BCD Special Courts-Martial

Records received by Clerk of Court	35
Days from charging or restraint to sentence	35
Days from sentence to action	48
Days from action to dispatch	7
Days from dispatch to receipt by the Clerk	8

COURT-MARTIAL AND NONJUDICIAL PUNISHMENT RATES

First Quarter Fiscal Year 1993; October-December 1992					
	ARMYWIDE	CONUS	EUROPE	PACIFIC	OTHER
<i>GCM</i>	0.42 (1.66)	0.37 (1.47)	1.05 (4.22)	0.33 (1.33)	0.82 (3.29)
<i>BCDSPCM</i>	0.13 (0.53)	0.14 (0.57)	0.11 (0.46)	0.12 (0.50)	0.68 (2.74)
<i>SPCM</i>	0.02 (0.10)	0.01 (0.05)	0.14 (0.57)	0.00 (0.00)	0.00 (0.00)
<i>SCM</i>	0.16 (0.66)	0.16 (0.62)	0.43 (1.71)	0.08 (0.33)	0.00 (0.00)
<i>NJP</i>	17.48 (69.94)	18.19 (72.78)	26.43 (105.73)	18.13 (72.52)	22.73 (90.91)

Note: Based on average strength of 601,786 (rates per thousand).
 Figures in parentheses are the annualized rates per thousand.

TJAGSA Practice Notes

Faculty, The Judge Advocate General's School

Contract Law Note

Contractor Appeals Revocation of Final Acceptance

The Court of Appeals for the Federal Circuit recently held that a contracting officer's final decision revoking acceptance of aircraft engines because of latent defects and ordering the contractor to correct performance was a government claim that was within the jurisdiction of a board of contract appeals.¹

The Navy awarded General Electric (GE) a series of contracts requiring GE to produce approximately 1200 jet engines for the F/A-18 aircraft. After accepting several engines, the Navy experienced failures that damaged the engines and the

aircraft. The Navy determined that latent defects in the engines caused the failures and the resultant damages.

Each contract contained an inspection clause that made acceptance of the engines final, except for latent defects, fraud, or gross mistakes amounting to fraud.² In the event of latent defects, these clauses provided remedies such as the following: (1) a requirement that the contractor correct or replace the items at no increase in contract price; (2) a reduction in contract price for delays; or (3) repayment of an equitable portion of the contract price.³ Additionally, each contract contained a disputes clause that required the parties to resolve disputes under the Contract Disputes Act (CDA).⁴

After determining that latent defects caused the failures, and after failing to persuade GE to correct the defects at the

¹ Garrett v. General Elec. Co., 987 F.2d 747 (Fed. Cir. 1993).

² See GENERAL SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. 52.246-2(k) (31 Dec. 1991) [hereinafter FAR].

³ See FAR 52.246-2(l).

⁴ Pub. L. No. 95-563, 92 Stat. 2383 (codified as amended at 41 U.S.C. §§ 601-613 (1988 & Supp. I 1989)).

contractor's expense, the contracting officer issued a final decision. This final decision ordered GE to correct the problem at no additional cost to the Navy, vitiated the acceptances under the inspection clause, and required GE to return \$1.25 million which the government had paid GE to investigate the cause of the engine failures. General Electric appealed the final decision to the Armed Services Board of Contract Appeals (ASBCA), which exercised jurisdiction over the appeal despite the Navy's objections.⁵ The Navy subsequently appealed the ASBCA's decision to exercise jurisdiction to the Federal Circuit.

On appeal, the Federal Circuit analyzed the CDA and its implementing regulations to determine whether the contracting officer's decision was an appealable final decision or merely a matter of contract administration. This was an important distinction because courts and boards generally do not exercise CDA jurisdiction over matters of contract administration.

First, the court noted that the CDA does not define specifically the term "claim," so that to obtain a definition of that term, the court must assess "regulations implementing [the CDA], the language of the contract in dispute, and the facts of the case." It noted that the applicable regulation—the *Federal Acquisition Regulation (FAR)*—defines a claim as a "written demand . . . by one of the contracting parties seeking, as a matter of right, (1) the payment of money in a sum certain, (2) the adjustment or interpretation of contract terms, or (3) other relief arising under or relating to the contract."⁶ The court held that the Navy's revocation of acceptance was "other relief arising under . . . the contract."

Second, the court weighed both parties' concern that Congress intended the CDA to achieve parity between the jurisdiction of the United States Court of Federal Claims and the boards of contract appeals.⁷ The court noted that Congress recently had expanded the jurisdiction of the Court of Federal Claims,⁸ and that the ASBCA's decision to assert jurisdiction over the Navy's claim against GE "preserves jurisdictional parity between the Court of Federal Claims and the boards." The court further noted that it has treated an appeal to a board from a termination for default without "monetary redress at stake" as a government claim.⁹

Third, the court rejected the Navy's concern over the prospect of "piecemeal litigation and premature involvement" in contract administration. The court concluded that the Navy's selection of one remedy—instead of others—should not preclude a contractor from bringing an appeal before the board. It further concluded that the government's revocation of acceptance was, under the circumstances, a government claim from which the contractor could appeal and over which the board could exercise jurisdiction.

This case increases the opportunity for contractors to appeal contracting officer decisions concerning matters that resemble contract administration. Furthermore, it invites contractors to seek to avoid the contractors' normal remedy under the disputes clauses, which is to perform the work ordered by the contracting officer and to file a claim later. Legal advisors should ensure that their contracting officers resist contractor's attempts to litigate disagreements involving routine matters of contract administration, while recognizing that this case has blurred the distinction between disagreements involving matters of contract administration and disputes arising under or relating to the contract. Major Killham.

Criminal Law Notes

COMA Further Extends the Good-Faith Exception: *United States v. Chapple*

In *United States v. Lopez*,¹⁰ the Court of Military Appeals (COMA) applied the good-faith exception to the exclusionary rule to a commander-authorized search or seizure. In *United States v. Mix*,¹¹ the COMA extended the exception beyond probable cause determinations when it held that the good-faith exception also applied to a commander authorized search over an area not under that commander's control. Recently, in *United States v. Chapple*,¹² the COMA has extended the good-faith exception further still. After *Chapple*, the exception also applies when a commander in good faith authorizes a search of a service member's overseas civilian apartment, even though that commander has no control over the service member or the apartment. *Chapple* is an important case for

⁵ See *General Elec. Co.*, ASBCA No. 36005, 91-2 BCA ¶ 23,958 (1991) (subsequent decision on merits at 91-3 BCA ¶ 24,353).

⁶ FAR 33.201.

⁷ See, e.g., S. REP. NO. 1118, 95th Cong., 2d Sess. 12 (1978).

⁸ Federal Courts Administration Act of 1992, Pub. L. No. 102-572, 106 Stat. 4506. The Act changed the doctrine set forth in *Overall Roofing & Constr. Inc. v. United States*, 929 F.2d 687 (Fed. Cir. 1991), and expanded the jurisdiction of the Court of Federal Claims to include some nonmonetary disputes.

⁹ See *Malone v. United States*, 849 F.2d 1441 (Fed. Cir. 1988).

¹⁰ 35 M.J. 35 (C.M.A. 1992).

¹¹ 35 M.J. 283 (C.M.A. 1992).

¹² 36 M.J. 410 (C.M.A. 1993).

practitioners overseas. Its holding, however, also *may* apply with equal force to similar commander-authorized searches on American soil. If so, *Chapple* is one of the most radical Fourth Amendment decisions to come out of the COMA in several years.

In *Chapple*, several sailors assigned to a ship berthed in Naples, Italy, reported that their checks had been stolen, and subsequently forged and cashed, at the ship's disbursing office. The accused, a sailor named Chapple, was a clerk at the disbursing office. Not surprisingly, when the Naval Investigative Service (NIS) began an investigation, it listed the accused as a possible suspect. When the NIS tried to interview Chapple as a matter of routine, he invoked his right to counsel.

A handwriting examiner compared Chapple's handwriting with the handwriting on one of the forged checks. He determined that "strong indications" existed that the accused had authored the forged document.

A few days later, the accused, "wearing Navy dungarees with 'R.A. Chapple' stenciled on the shirt," appeared at the Navy Federal Credit Union in Naples. He had a checkbook belonging to a Navy officer with him, and explained to the bank teller that the checkbook belonged to his boss, and that the latter had sent him to get additional checks. The teller left the accused to verify the account, but when she returned Chapple had left. The teller told the credit union manager what had happened. The credit union manager knew that the checkbook in question had been reported missing, and that the officer to whom it belonged had left Naples some six months earlier. Consequently, the manager reported the accused's activities to the NIS. The NIS learned that the accused lived offbase with his fiancée in an apartment she leased from an Italian landlord. This lease had been negotiated through the housing referral office run by the Naval Support Activity (NAVSUPPACT) in Naples.

Armed with this information, the NIS requested authorization to search the off-base quarters from the NAVSUPPACT commander. After consulting with his staff judge advocate, the commander authorized a probable-cause search of the apartment for the stolen checks.¹³ The subsequent search uncovered a number of the stolen checks.

Neither the accused nor his fiancée, however, were members of NAVSUPPACT. Consequently, at trial, the accused argued that the search of the apartment was illegal because he was not a member of NAVSUPPACT, and its commander had no authority over him. In sum, the accused argued that even if probable cause for the search existed, the search was illegal because the commander authorizing it did not have authority over the accused.

On appeal, the COMA examined Military Rule of Evidence 315(d)(1), which controls who has the power to authorize a search. It reads, "A commander . . . , *who has control over the place where the property or person to be searched is situated or found* [may authorize a search of that property or person]."¹⁴

After examining the authority given the NAVSUPPACT commander in a higher headquarters directive, the COMA determined that the commander's operation of a housing referral office did not confer authority to authorize probable cause searches of civilian quarters obtained through that office. Rather, "[h]is responsibility is to support members of tenant and supported units, not command them."¹⁵ Consequently, because the NAVSUPPACT commander also lacked control over the accused's unit or that of his fiancée, he legally could not authorize a search of their apartment.

While agreeing with the accused that no actual authority existed to authorize the search of his apartment, the COMA nevertheless ruled that the "fruits of the search [were] admissible under the good faith exception."¹⁶ First, the NAVSUPPACT commander "was a commander, with general authority to authorize searches." He believed that he had the authority to authorize a search of the off-base apartment. So did his servicing staff judge advocate, who advised the NAVSUPPACT commander that he could do so.¹⁷

Moreover, the NAVSUPPACT commander's mistake did not make the stolen checks inadmissible, because the "exclusionary rule is designed to deter police misconduct rather than punish . . . errors of judges and magistrates." Because the NAVSUPPACT commander was acting as a magistrate when he authorized the search of the accused's apartment, his error did not render the evidence inadmissible. On the contrary, the NIS agents executed the commander's search authorization in the belief that he did have authority to grant the search author-

¹³The NIS initially did not use the search authorization because the accused's fiancée consented to entry into her apartment. Because she had locked her keys into her apartment, however, she was unable to admit the NIS agents. Consequently, the NIS took the accused to the apartment and "ordered him to unlock the entrance" at which time the NIS then searched the apartment. The military judge considered the validity of the accused's fiancée's earlier consent moot because of this subsequent order given to the accused to unlock the apartment. *Id.* at 412.

¹⁴MANUAL FOR COURTS-MARTIAL, United States, MIL. R. EVID. 315(d)(1) (1984) [hereinafter MCM] (emphasis added).

¹⁵*Chapple*, 36 M.J. at 413.

¹⁶*Id.*

¹⁷At trial, the military judge also believed that the commander had the authority to authorize the off-base search. *Id.*

ization. Because this was a reasonable belief, the COMA applied the good-faith exception codified in Military Rule of Evidence 311(b)(3)¹⁸ and admitted the evidence.¹⁹

Chapple provides important insights into the COMA's view of the Fourth Amendment and the good-faith exception to the exclusionary rule. First, like the commander in *Lopez*, the NAVSUPACT commander consulted his staff judge advocate before authorizing the search of the accused's apartment. Even though the commander received erroneous legal advice, the COMA does not see this as controlling. Instead, the COMA believes that a commander who consults with his or her lawyer reflects the "reasonableness" that the good-faith exception to the exclusionary rule is designed to serve. In sum, any commander who consults with a judge advocate prior to authorizing a search is more likely to have an appellate court apply the good-faith exception to that search.

Second, the rationale in *Chapple* also may apply to domestic searches. The lead opinion by Judge Gierke does not specifically restrict *Chapple* to overseas search scenarios. Instead, a fair reading of *Chapple* leads to the conclusion that the good-faith exception announced in it can apply to commander-authorized searches on American soil as well. For example, suppose that a brigade commander in the United States is told by his trial counsel that he properly may authorize a search of a soldier's on-post quarters. The quarters are not located in the brigade area, but the trial counsel advises the commander that a search authorization is proper because the soldier is a member of the brigade. If it later is discovered that this soldier was not a member of the brigade, and was not otherwise under the commander's control, the rule in *Chapple* apparently would permit the admissibility of any evidence or contraband seized. The key factor will be the commander's reasonableness in relying on his judge advocate's advice, and the good faith of the agents executing his search authorization.

Suppose further that this same brigade commander is informed that a number of weapons recently stolen from his unit's arms rooms likely are offpost in a soldier's civilian apartment. The commander determines that probable cause

exists, and asks his trial counsel if he properly can authorize a search of the apartment. The trial counsel, albeit erroneously, informs the commander that he can authorize the off-post search because the soldier is a member of the brigade, and because stolen military property is being sought. Again, a fair reading of *Chapple* indicates that if the commander acted reasonably in authorizing the search, and the agents executed the search authorization in good faith, then any property seized is admissible, even though no commander has the authority to order a probable-cause search beyond the boundary of a military reservation on American soil.

Did the COMA intend to expand a commander's authority to search both on and off post? This result seems unlikely. A fair reading of *Chapple*, however, indicates that such domestic search scenarios now may yield admissible evidence. Such an interpretation means a significant potential expansion of military search and seizure law into what traditionally has been the exclusive province of civilian judicial authorities. It also raises a possible constitutional question. Given the United States military's subordination to civilian authority, can—or should—military commanders search and seize property and persons in areas that ordinarily require the use of civilian magistrates and judges?²⁰

Finally, *Chapple* indicates that the COMA continues to focus on the reasonableness clause of the Fourth Amendment.²¹ The COMA says that it is applying the good-faith exception in *Chapple*. Practitioners more easily may understand and appreciate the rationale in *Chapple*, however, if the COMA had called this a good-faith exception. This clearly would distinguish the COMA's reasoning in *Chapple* from the good-faith principles announced in *Leon* and Military Rule of Evidence 311(b)(3).²² In sum, the good-faith exception generally applies to probable cause and warrant determinations. It initially emerged to prevent the exclusion of evidence resulting from police wrongdoing committed while conducting the search or seizure. Consequently, the focus in *Leon* and its progeny was on the reasonableness and good faith of the persons carrying out the authorization, who are performing an executive law enforcement function, rather than on the state of

¹⁸MCM, *supra* note 14, MIL. R. EVID. 311(b)(3). It states in pertinent part, "Evidence that was obtained as a result of an unlawful search or seizure may be used if . . . the officials seeking and executing the authorization or warrant reasonably and with good faith relied on the issuance of the authorization or warrant. Good faith shall be determined on an objective standard."

¹⁹Judge Gierke wrote the lead opinion, in which Judges Cox, Crawford, and Wiss concurred. All four agreed that the good-faith exception applied to the NAVSUPACT commander's "unauthorized" search. Chief Judge Sullivan, however, believed that the search was legal because the NAVSUPACT commander *did* have authority to grant the search authorization. Consequently, the Chief Judge concurred in the result in *Chapple*. *Chapple*, 36 M.J. at 414.

²⁰The Fourth Amendment sets the parameters on government intrusions by placing limitations on police conduct, rather than setting out what is, or is not, lawful. Similarly, when evidence is admitted at trial through the use of an exception to the exclusionary rule, this does not mean that the search or seizure was lawful. On the contrary, it means only that the evidence will not be excluded. Consequently, *Chapple* does not stand for the proposition that a commander may lawfully authorize a search of an area or person over which he or she has no control. Rather, *Chapple* signals that if such a search is authorized, any evidence seized will not be excluded.

²¹The COMA's focus remains on the reasonableness clause, as opposed to the "probable cause warrants," clause of the Fourth Amendment. U.S. CONST. amend. IV.

²²MCM, *supra* note 14, MIL. R. EVID. 311(d)(3).

mind of the authorizing official, who is performing a judicial function. Accordingly, the COMA's decisions in *Mix* and *Chapple*²³ go well beyond what is usually meant by the good-faith exception because they shift the focus of the good-faith inquiry to encompass the reasonableness and good faith of the authorizing official. In expanding the good-faith exception to include situations in which the commander lacks authority to issue the order to search or seize, the COMA has moved well beyond the original purpose for the good-faith exception. The COMA should emphasize that a good-faith exception is rooted in the reasonableness clause of the Fourth Amendment. Stated differently, the COMA should stress that decisions like *Mix* and *Chapple* indicate that a commander who acts reasonably in ordering a search or seizure may find that an otherwise bad search is saved by a good-faith exception, rather than by the good faith exception. Major Borch.

**When Is a Foreign Search or Seizure
"Participated In" by United States Personnel?
Army Court of Military Review Gives Guidance in
*United States v. Porter***

Practitioners litigating search and seizure issues overseas learn quickly that the Fourth Amendment generally does not apply to evidence gathered by foreign officials. For example, if a Dutch customs officer searches and then seizes contraband from a soldier crossing the Dutch-Belgian frontier, that contraband almost always is admissible at the soldier's court-martial. Because the Fourth Amendment exists principally to protect an American citizen against intrusions committed by officials and agents of the United States, the exclusionary rule generally does not apply to evidence obtained by officials of The Netherlands or any other foreign sovereign. Additionally, American concepts like "probable cause" and "totality of the circumstances" usually are irrelevant in determining the legality of any search or seizure administered by foreign officials. Furthermore, even if a Dutch police officer violates Dutch law when seizing contraband from a soldier, that violation will not exclude the contraband at the soldier's subsequent court-martial. The Fourth Amendment's exclusionary rule is applied when it will deter American police misconduct. Applying it to foreign police misconduct will not further this policy goal.²⁴

Despite these general rules, a foreign search or seizure may trigger Fourth Amendment protections in three situations. First, if the search and seizure violates American concepts of "fairness," the application of the exclusionary rule is required on due process grounds.²⁵ Second, if American military authorities request the foreign search, a court will view it as United States government conduct and apply the Fourth Amendment—assuming the accused had an expectation of privacy in the area searched or the item seized.²⁶ Finally, if a United States official participates in the foreign search or seizure, the Fourth Amendment applies if the degree of American participation is such that the search or seizure is viewed as American law enforcement.

When the Military Rules of Evidence were implemented in 1980, the Fourth Amendment's relationship to searches and seizures carried out by foreign officials was codified in Military Rule of Evidence 311(c).²⁷ That rule provides,

A search or seizure is "unlawful" if it was conducted, instigated, or participated in by:

(1) *Military personnel.* Military personnel or their agents and was in violation of the Constitution. . . , an Act of Congress applicable to trials by courts-martial that requires exclusion of evidence obtained in violation thereof, or Mil. R. Evid. 312-317;

A search or seizure is not "participated in" merely because a person is present at a search or seizure conducted in a foreign nation by officials of a foreign government or their agents, or because a person acted as an interpreter or took steps to mitigate damage to property or physical harm during the foreign search or seizure.

If the military police do the searching, or ask a foreign official to seize evidence, the Fourth Amendment applies and Military Rule of Evidence 311(c) may operate to make the search unlawful. But what about the situation in which the

²³To some extent, *Lopez* also evidences the application of a good-faith exception, rather than the good-faith exception. Judge Crawford's lead opinion in *Lopez* states that "all five judges agree that a good faith exception applies." *Lopez*, 35 M.J. at 37 (emphasis added). More than semantics are involved because Judge Cox rejected the application of the good-faith exception in *Lopez*. *Id.* at 46 ("Although I do not believe that the good faith exception created in *United States v. Leon* is apropos to command-ordered searches and seizures. . . .") (citations omitted).

²⁴See generally MCM, *supra* note 14, app. 22, at A22-17; *United States v. Morrison*, 12 M.J. 272 (C.M.A. 1982); *United States v. Baker*, 16 M.J. 689 (A.C.M.R. 1983).

²⁵MCM, *supra* note 14, app. 22, at A22-17.

²⁶For the Fourth Amendment to protect an accused against government intrusion, he or she must have an expectation of privacy in the area searched or the item seized. The Fourth Amendment, therefore, does not apply to all law enforcement searches and seizures. See *Rakas v. Illinois*, 439 U.S. 128 (1978).

²⁷MCM, *supra* note 14, MIL. R. EVID. 311(c).

military police accompany the foreign police when the latter search or seize contraband from a service member? Are the military police "participating in" that search? What does the term mean? Even though Military Rule of Evidence 311(c) gives three illustrations of what is not considered participation, it fails to define the term. Practitioners looking for a definition, or desiring a better understanding of when American police involvement in a foreign search or seizure triggers the Fourth Amendment and Military Rule of Evidence 311(c), should look to the recent Army Court of Military Review (ACMR) decision in *United States v. Porter*.²⁸

The accused, Sergeant (SGT) Tyrone Porter, was a soldier stationed in Panama. Late one evening he was driving his motor vehicle in Panama City, when he struck and killed a twenty-year-old Panamanian crossing the street. After hitting the pedestrian, the accused lost control of his car, which ran up on a sidewalk and crashed into a telephone pole. Panamanian policeman Salazar found the accused in his car. He apparently then contacted United States authorities at Fort Clayton, and shortly thereafter Specialist (SPC) Tucker, a military policeman, arrived on the scene. Specialist Tucker observed that the accused "appeared to be groggy and sleepy The strong odor of alcohol covered [his] breath."²⁹

Officer Salazar took the accused to a Panamanian hospital for a blood alcohol test (BAT). Hospital personnel informed Salazar and Tucker "that it would be at least two hours before a BAT could be administered, if at all that night." Consequently, Salazar asked his American counterpart if a BAT could be done at an Army hospital. Specialist Tucker replied that "they should take the [accused to the Army hospital] and see what could be done there."³⁰ When Salazar, Tucker, and the accused arrived at the Army hospital, they were told that a Panamanian policeman could not "request" a BAT and that one "could be performed only if SPC Tucker completed the required" *DD Form 1323, "Toxicological Examination-Request and Report."*³¹ Specialist Tucker completed the required paperwork, and a BAT was performed on the accused. The results showed the accused's blood alcohol content was twenty-six hundredths of a percent.

On appeal, the accused claimed that the taking of his blood was an unlawful search and seizure. He did not deny the existence of probable cause. He argued that SPC Tucker had not obtained authorization from any competent authority for the BAT. In short, "SPC Tucker's *participation* in the BAT process was a search and seizure that required either a search warrant or authorization or the existence of exigent circumstances."³² Porter argued that Tucker failed to get any authorization, and no exigent circumstances existed. Consequently, the accused asserted that the BAT results were inadmissible under Military Rule of Evidence 311(c).

The Government countered that SPC Tucker had not taken part "in what, in essence, was a foreign search, and therefore, a search warrant or authorization from a competent military authority was not required."³³ Alternatively, the Government responded that if SPC Tucker's participation in officer Salazar's criminal investigation did bring the BAT under the Fourth Amendment and Military Rule of Evidence 311(c)(3), then no authorization was needed because the BAT was a probable cause search and seizure conducted under exigent circumstances.³⁴

In analyzing whether SPC Tucker's "participation in" the Panamanian investigation made the Fourth Amendment and Military Rule of Evidence 311 applicable to the blood alcohol evidence, the ACMR primarily focused on the BAT being administered at an American-run military hospital. The ACMR found this to be an important factor because, at the hospital, "SPC Tucker took on a role that was beyond the bounds of being a bystander."³⁵ Only American hospital personnel would administer a BAT to the accused at the request of an American official; therefore, the seizure of blood from the accused lost its character as a Panamanian search. Accordingly, "the actual search [and seizure] in this case was performed exclusively"³⁶ by SPC Tucker and United States medical personnel. In sum, SPC Tucker's involvement went beyond that of interpreter and observer because no BAT could have been administered *but for* his "requesting the BAT, signing the required form, and assisting the nurse to administer the

²⁸ 36 M.J. 812 (A.C.M.R. 1993).

²⁹ *Id.* at 814.

³⁰ *Id.*

³¹ *Id.*

³² *Id.* at 815 (emphasis added).

³³ *Id.* The Government's position was strengthened by the military judge's essential findings of fact, concluding that the BAT was a Panamanian search and seizure and that no American law enforcement participated in that foreign seizure. The trial judge viewed the American hospital personnel as agents of the Panamanians. He decided that this agency status did not trigger Military Rule of Evidence 311 and therefore no American search or seizure occurred. The ACMR, however, rejected the trial judge's findings of fact.

³⁴ *Id.* Under Military Rule of Evidence 315(g)(1), a search authorization is not required for a search or seizure based on probable cause when "[t]here is a reasonable belief that the delay necessary to obtain a search authorization . . . would result in the removal, destruction, or concealment of the property or evidence sought." The ACMR rejected the exigent circumstances argument in *Porter*. See *infra*, note 38.

³⁵ *Porter*, 36 M.J. at 815.

³⁶ *Id.*

BAT.”³⁷ The court concluded that SPC Tucker’s actions made the seizure of the accused’s blood a United States search and seizure. Although probable cause for the search and seizure existed, because SPC Tucker failed to obtain a search authorization, the BAT results should not have been admitted at the accused’s trial.³⁸

The *Porter* decision provides several useful practice tips. First, it demonstrates that, no matter how legitimate the foreign interests in conducting a search of a soldier may be, it will be viewed as a United States search if American participation occurs as defined by Military Rule of Evidence 311(c). Consequently, the existence of legitimate, independent grounds for foreign officials to conduct a search or seizure are irrelevant when determining the degree of American military involvement under Military Rule of Evidence 311(c). In sum, the focus is on the extent of American involvement in a search, not whether the foreign police are conducting their own independent, legitimate criminal investigation.

Second, *Porter* shows that the ACMR will read Military Rule of Evidence 311(c) literally. “Participated in” means just what it says, except for the three exceptions listed in the rule. No one can argue that SPC Tucker’s acts in the American hospital were those of a mere bystander. Consequently, he “participated in” the foreign search and this brought the BAT under the Fourth Amendment and Military Rule of Evidence 311(c). *Porter* draws the line at conduct that goes beyond the three exceptions found in the text of the rule. When military personnel do more than interpret, protect the accused and his or her property, or act other than as a bystander might act, then they cross the line, and the ACMR apparently will find “participation.” This result is a fair reading of Military Rule of Evidence 311(c). Major Borch.

International Law Note

NEPA in the “Global Commons”

Operational lawyers should take note of the international reach of a recent court of appeals environmental law decision that highlighted the concepts of the extraterritorial effect of

statutes and the “global commons.”³⁹ The global commons are areas generally considered to be outside the jurisdiction of nations and include outer space, the high seas, and Antarctica. The case involves the application of the National Environmental Policy Act (NEPA) to the activities of the National Science Foundation (the Foundation) in Antarctica. The Environmental Defense Fund (the Fund) alleged that the Foundation’s practice of burning food wastes in an open landfill at its McMurdo Station facility in Antarctica produced potentially toxic pollutants. The Fund alleged that the Foundation began this practice without complying with the NEPA environmental decision-making process; specifically, the Foundation failed to prepare an environmental impact statement. Arguing that the NEPA had extraterritorial application, the Fund sought a preliminary injunction to enjoin the Foundation’s incineration practice.

The Foundation countered that the presumption against the extraterritorial application of United States statutes—articulated by the Supreme Court in *Equal Opportunity Employment Commission v. Arabian American Oil Co.*⁴⁰—applied to its actions in Antarctica.

The court held that the NEPA *did* have extraterritorial effect and stressed the following two factors in determining whether to apply the presumption against extraterritoriality: (1) whether the statute regulates conduct within the United States or in another state; and (2) whether the NEPA creates a potential for clashes between domestic and foreign law.⁴¹ The court reviewed the unique nature of the NEPA and concluded that it regulated the domestic conduct of government agencies. The NEPA mandates that the agency consider the environmental impact of a proposed action, but it does not require the agency to adhere to any particular policy or arrive at a certain result in evaluating its proposed action.⁴² The court held that this decision-making process occurred exclusively within the agency and within the United States.⁴³ The court also stated that the NEPA never would require enforcement in a foreign forum or create any conflict of law questions.⁴⁴ Therefore, because the NEPA did not attempt to govern conduct in a foreign state, the presumption against extraterritorial application did not apply.

³⁷ *Id.* Specialist Tucker assisted the nurse by “escort[ing]” the accused to the emergency room for the taking of the blood, and “by placing the seal on the blood tube” containing the accused’s blood.

³⁸ *Id.* The ACMR also rejected the Government’s alternative “exigent circumstances” argument. It held that SPC Tucker knew the accused’s name and his unit, and had sufficient time to get a search authorization from his commander. Although it concluded that the BAT evidence was inadmissible, the ACMR affirmed both findings and sentence on the ground that “there was ample [other] evidence of [the accused’s] intoxication at the time of the fatal accident to support [his] conviction.”

³⁹ *Environmental Defense Fund, Inc. v. Massey*, 986 F.2d 528 (D.C. Cir. 1993).

⁴⁰ 111 S. Ct. 1227 (1991).

⁴¹ *Massey*, 986 F.2d at 532.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.* at 533.

The court bolstered its holding by stating that the presumption against extraterritoriality has less vitality in an area of the global commons.⁴⁵ The global commons concept has been codified into treaty law via the Outer Space Treaty,⁴⁶ the Law of the Sea Convention,⁴⁷ and the Antarctic Treaty.⁴⁸ Article II of the Outer Space Treaty and Article 89 of the Law of the Sea Convention expressly prohibit any nation from asserting sovereignty over outer space or the high seas. Article IV of the Antarctic Treaty essentially places a moratorium on the assertion of claims of sovereignty over Antarctica. In these "sovereignless" regions—with a significantly reduced likelihood that conflict of laws problems would occur—the court reasoned that the presumption against extraterritoriality had "little relevance."⁴⁹ The court then proceeded to dismiss the Foundation's arguments that extraterritorial application would create foreign policy problems and that, even if NEPA had extraterritorial effect, the environmental impact statement provisions of the NEPA would not apply in Antarctica.⁵⁰

The court concluded by emphasizing that its holding was limited to the facts of the case—that is, the NEPA had extraterritorial application in Antarctica.⁵¹ Expressly left open by the court were the questions of whether the NEPA would apply to actions in situations involving sovereign states and whether other United States statutes would have extraterritorial effect when applied to Antarctica.⁵² Additionally, given the court's discussion of the global commons, the case raises questions concerning the NEPA's application to actions in outer space or the high seas. The government did not seek certiorari in this case. While *Massey* may end up limited to its facts, practitioners should be aware of the potentially broad impact of the case. Lieutenant Commander Winthrop.

Legal Assistance Items

The following notes have been prepared to advise legal assistance providers of current developments in the law and in

legal assistance program policies. They can be adapted for use as locally published preventive law articles to alert soldiers and their families about legal problems and changes in the law. We welcome articles and notes for inclusion in this portion of *The Army Lawyer*. Send submissions to The Judge Advocate General's School, ATTN: JAGS-ADA-LA, Charlottesville, VA 22903-1781.

Consumer Law Note

Legal Assistance Attorneys Are Not Debt Collectors

When the Fair Debt Collection Practices Act was passed, attorneys were excluded from the definition of "debt collector."⁵³ Congress, however, soon recognized that attorneys increasingly were becoming involved in debt collection activities and to exclude them from the requirements of the Act would not only harm consumers but also work to the competitive disadvantage of debt collectors who were subject to the Act.⁵⁴ Consequently, Congress amended the Act in 1986, to include attorneys.⁵⁵ As a result, any attorney who regularly engages in collecting debts for others may be considered a debt collector subject to the Act.⁵⁶

This definition raises the question of whether legal assistance attorneys (LAAs) are "debt collectors" when, on behalf of their clients, they contact debtors or third parties seeking payments. Legal assistance attorneys act for their clients in contacting others who owe them consumer debts. If LAAs are subject to the Act, they would be limited severely in their abilities to contact both debtors and third parties.⁵⁷

The Act provides, however, that officers and employees of the United States—or of any state—are *not* "debt collectors"

⁴⁵ *Id.* at 534.

⁴⁶ Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space Including the Moon and Other Celestial Bodies, Jan. 27, 1967, 18 U.S.T. 2410, T.I.A.S. No. 6347, 610 U.N.T.S. 205.

⁴⁷ Convention on the Law of the Sea, Dec. 10, 1982, 21 I.L.M. 1261.

⁴⁸ Antarctic Treaty, Dec. 1, 1959, 12 U.S.T. 794, T.I.A.S. No. 4780, 402 U.N.T.S. 71.

⁴⁹ *Massey*, 986 F.2d at 534.

⁵⁰ *Id.* at 534-35.

⁵¹ *Id.* at 537.

⁵² *Id.*

⁵³ 15 U.S.C. § 1692a (1977) ("The term *debt collector* . . . does not include . . . any attorney-at-law collecting a debt as an attorney on behalf of and in the name of a client").

⁵⁴ H.R. REP. No. 405, 99th Cong., 2d Sess. 1 (1986), reprinted in 1986 U.S.C.C.A.N. 1752, 1754.

⁵⁵ Pub. L. No. 99-361, 100 Stat. 768 (1986).

⁵⁶ See *Crossley v. Lieberman*, 868 F.2d 566 (3d Cir. 1989) (attorney's egregious noncompliance with the Fair Debt Collection Practices Act supported imposition of statutory maximum damages).

⁵⁷ See 15 U.S.C. § 1692c (1988).

to the extent that their collection activities are in the performances of their official duties.⁵⁸ Legal assistance regulations may require LAAs to assist clients in matters regarding debts and consumer credit matters.⁵⁹ Legal assistance attorneys clearly are working in the scope of their official duties when handling most debt-related complaints from their clients. Accordingly, they should not be considered "debt collectors" for purposes of the Fair Debt Collection Practices Act. Major Hostetter.

Estate Planning Note

Uniform Statutory Will Act

Legal assistance practitioners are prohibited from preparing "fill-in-the-blank" wills unless the testator's state of domicile statutorily authorizes such a will.⁶⁰ A few states⁶¹ have developed their own unique statutory wills. Recently, however, Massachusetts⁶² and New Mexico⁶³ have adopted the Uniform Statutory Will Act.⁶⁴ This note summarizes how the Act works and why LAAs might consider using uniform statutory wills in appropriate circumstances.

The uniform statutory will form requires the testator to fill in blanks identifying the testator and the nominees for personal representative, trustee, and guardian of minor children, if any. The remainder of the form is devoted to short testimony,

attestation, and notarization clauses. The will is self-proving and fits on one page.⁶⁵

The form does not contain any dispositive provisions. All dispositive provisions instead are incorporated by reference to the Act.⁶⁶ The Act provides that if a spouse survives and no children exist, the spouse takes the estate. If children remain, but the spouse fails to survive, the children take the estate (in trust, for minor children). If both spouse and children survive the testator, then the spouse will take the residence and the greater of one-half the remainder of the estate or of \$300,000. After the spouse's share of the estate is deducted, the balance of the estate then is placed in trust with the income for life to the spouse and the remainder to the children.⁶⁷

The Act provides some flexibility. For example, a testator can insert specific bequests,⁶⁸ and can vary the timing of trust termination and distribution.⁶⁹

Why might LAAs consider using a uniform statutory will, particularly considering the availability of the Minuteman will program on the Legal Automation Army-Wide System (LAAWS) software? Computer support simply may not be available. Even when the LAAWS is available, certain situations—such as large mobilizations—may involve unavoidable time, personnel, and hardware limitations that require augmenting the will drafting process. A preprinted, one-page uniform statutory will can expedite the procedure and may be satisfactory to military clients.⁷⁰

⁵⁸ 15 U.S.C. § 1692a(6)(C) (1988); see also *Gary v. Spires*, 473 F. Supp. 878 (D.S.C. 1979) (administrator of county government check clearing house that processed for prosecution bad checks forwarded by local merchants was excluded from the Act's definition of "debt collector"); Informal Federal Trade Commission Staff Opinions by Ridgway, Mar. 27, 1978, Oleson, Apr. 20, 1978, reprinted in NATIONAL CONSUMER LAW CENTER, FAIR DEBT COLLECTION 511, 515 (2d ed. 1991) (activities of the government officials must be within their "official" duties and not involve ultra vires acts).

⁵⁹ DEP'T OF ARMY, REG. 27-3, LEGAL SERVICES: THE ARMY LEGAL ASSISTANCE PROGRAM (30 Sept. 1992) (legal assistance will be provided in cases involving, among other things, nonsupport, landlord tenant disputes, and disputes over lending agreements) [hereinafter AR 27-3]. See also, DEP'T OF NAVY, MANUAL, MANUAL OF THE JUDGE ADVOCATE GENERAL, ch. VII (3 Oct. 1990) Legal Assistance (legal assistance services include providing advice and assistance in nonsupport and indebtedness, "including communication, correspondence, and negotiations with another party or lawyer, on behalf of the client"); DEP'T OF AIR FORCE, AIR FORCE REG. 110-22, LEGAL ASSISTANCE PROGRAM (22 Aug. 1975) ("legal assistance officers will offer consultation, advice, and assistance to eligible clients on all personal civil legal matters").

⁶⁰ AR 27-3, *supra* note 59, para. 3-6b(2)(b).

⁶¹ California, Maine, Michigan, and Wisconsin have developed statutory wills.

⁶² MASS. GEN. LAWS ANN. ch. 191B, §§ 1-15 (West 1987).

⁶³ N.M. STAT. ANN. §§ 45-2A-1 to 45-2A-17 (Michie 1991).

⁶⁴ UNIF. STAT. WILL ACT, 8A U.L.A. 385 (West Supp. 1992).

⁶⁵ *Id.* app. I, at 403. This form will be reprinted in the 1993 update of the *Wills Guide*. ADMIN. & CIV. L. DIV., THE JUDGE ADVOCATE GENERAL'S SCHOOL, U.S. ARMY, JA 262-91, WILLS GUIDE (Dec. 1991).

⁶⁶ UNIF. STAT. WILL ACT, 8A U.L.A. 385, 390 (West Supp. 1992).

⁶⁷ *Id.* §§ 5-9 at 391-96.

⁶⁸ *Id.* § 3(c), at 390.

⁶⁹ The Act specifies that, in the absence of direction in the will to the contrary, a trust will terminate when the youngest child reaches age 23. *Id.* § 8(a), at 394.

⁷⁰ The Uniform Statutory Will was designed, in part, as a way to encourage individuals—who otherwise might die intestate—to draft a will and make the important decisions about who will manage the estate and the children. Additionally, the Act's property disposition scheme—which favors the spouse over the children—is closer to what most testators want than the prevalent statutes of descent and distribution—which favor the children at the expense of the spouse. *Id.* prefatory note, at 386.

Additionally, the uniform statutory will has some tax advantages over the LAAWS will. If the combined gross estates of the soldier and the soldier's spouse exceed \$600,000, wills prepared on LAAWS will not protect the estate from federal estate taxes upon the death of the second-to-die spouse.⁷¹ The uniform statutory will provisions, however, were drafted so that, for larger estates, some of the assets of the first spouse to die would be placed in a qualified terminable interest property (Q-TIP) trust. Depending on the type and distribution of assets between the spouses at the time of death, uniform statutory wills could protect as much as 1.2 million dollars of combined assets from any federal estate taxation.⁷² Major Peterson.

Tax Note

Failing to File a Timely Return:

Holder v. Commissioner Examines the Financial Liability

What happens when a taxpayer fails to file a return timely, but has adequate withholding to cover the federal income tax liability? Is this taxpayer liable for the failure to file penalty?⁷³ What about the Internal Revenue Code (IRC) addition to tax penalty for disregarding rules or regulations?⁷⁴ In *Patronik-Holder v. Commissioner*,⁷⁵ the Tax Court answered these questions, holding that the taxpayer did not owe a penalty for failing to file, but did owe the addition to tax penalty for negligence or intentionally disregarding rules or regulations.

In this case, the taxpayer did not file a tax return for 1988 and the Internal Revenue Service (IRS) assessed an income tax deficiency. After receipt of the notice of deficiency, the taxpayer had several conferences with IRS officials before filing a joint federal income tax return for 1988 in 1992. The final federal income tax liability was less than the withholding credits, but the IRS imposed a \$100 penalty for failing to file a timely return and a \$525.50 penalty for negligence or intentionally disregarding rules or regulations.

Under the IRC, a taxpayer who fails to file a timely return within sixty days of the return due date⁷⁶ is subject to penalty, unless the taxpayer can establish that the failure to file was due to reasonable cause and not willful neglect.⁷⁷ This penalty is "the lesser of \$100 or 100 percent of the amount required to be shown as tax" on the return.⁷⁸ Section 6651(b)(1) of the IRC reduces the amount required to be shown as tax by any amount withheld from the taxpayer. Accordingly, for purposes of the section 6651(a) failure to file penalty, if the taxpayer's income tax withholdings equal or exceed the tax liability, the failure to file penalty is zero.⁷⁹

The taxpayer also disputed the IRS deficiency imposed under section 6653(a)(1)—an addition to tax for negligence or disregard of rules or regulations. Under this IRC section, a taxpayer may be assessed an addition to tax equal to five percent of the underpayment when any part of the underpayment resulted from the taxpayer's negligence or disregard of rules or regulations. The taxpayer contended that no underpayment occurred because the withholdings exceeded the final tax liability. The Tax Court disagreed, however, noting that an "underpayment" under section 6653 is a "deficiency" as defined in section 6211.⁸⁰ That section defines a deficiency as the amount by which the tax liability exceeds the tax shown on a timely filed return. The court also noted that section 6211(b)(1) provides that petitioner's tax shall be determined without regard to any withholding credits under section 31. Accordingly, the taxpayer's withholdings could not count toward the tax liability for purposes of the addition to tax for negligence or disregard of rules or regulations penalty. The court then determined that the underpayment was due to negligence or intentional disregard of rules or regulations and the IRS assessment for the section 6653(a)(1) penalty was correct.

Legal assistance providers may desire to caution military taxpayers about the failure to file and addition to tax penalties that may be imposed under the IRC. Major Hancock.

⁷¹ The LAAWS-generated wills share the inability to protect estates exceeding \$600,000 from federal estate taxes on the death of the second-to-die spouse. This deficiency assumes that each spouse leaves everything to the other spouse.

⁷² See UNIF. STAT. WILL ACT, 8A U.L.A. 385, § 6, prefatory note (comt.), at 386, 393.

⁷³ I.R.C. § 6651(a) (Maxwell Macmillan 1991).

⁷⁴ *Id.*

⁷⁵ 100 T.C. No. 24, 1993 WL 128151 (Tax Ct. Apr. 26, 1993).

⁷⁶ The return due date usually is April 15th of the calendar year following the tax year.

⁷⁷ I.R.C. § 6651(a) (Maxwell Macmillan 1991).

⁷⁸ *Id.*

⁷⁹ The IRS had contended that the "amount required to be shown as tax" on the return was not reduced by withholding credits when applying the minimum addition to tax for extended failure to file. The tax court examined the legislative history and statutory language of section 6651 and concluded otherwise.

⁸⁰ IRC § 6653(c)(1) (Maxwell Macmillan 1991).

Claims Report

United States Army Claims Service

Personnel Claims Note

Publication of Claims Information

The United States Army Claims Service (USARCS) continues to encourage field offices to publish claims information locally to take a more proactive role to educate soldiers in the community. Mr. Manny Caro of the Fort Bliss, Texas, claims office has published articles in the Fort Bliss *Monitor* on the following topics:

- a. Timely notice to carriers on the DD Forms 1840 and 1840R.
- b. Securing personal property to reduce the chance of theft.
- c. Requiring post registration of bicycles.
- d. The new Army policy on fraudulent claims.
- e. The Army claims system not serving as an insurance policy—explaining limitations and the wisdom of obtaining private insurance.

Mr. Caro has agreed to share this information with other field claims offices who wish to publish similar guidance at their installations. Anyone wishing to obtain copies of these articles should contact Mr. Caro at the Fort Bliss, Texas, claims office. Mr. Caro has done an exceptional job and we extend our thanks for his efforts. Ms. Zink.

Management Note

Base Realignment and Closure

A base realignment and closure (BRAC) presents a variety of challenges to an installation legal office. Advanced planning is imperative if the termination or transfer of responsibilities is to take place in an orderly fashion. Experience has shown that advanced planning is difficult because changes take place quickly and often. New announcements of base closures may render the most meticulously planned transition useless. Consequently, the best way to meet the challenges is

to understand the nature of each mission to make informed decisions and recommendations. Although an installation may close or reduce in size, not all of the missions terminate. Some just may be transferred to another installation. Army claims is one such mission.

Army Regulation 27-20, Dep't of Army, Reg. 27-20, Legal Services: Claims, para. 1-7b(4) (28 Feb. 1990), directs that the Commander, USARCS, will designate claims responsibilities throughout the Army. These responsibilities are assigned using a geographical area concept. Area claims offices and claims processing offices carry out the claims mission in the continental United States (CONUS). Forty-five area claims offices have been assigned claims responsibilities for specific geographical areas in CONUS. In many of these areas, subordinate claims processing offices have been established and assigned responsibilities under the area claims office.

Area claims offices investigate, settle, and pay all claims in their geographical area of responsibilities, up to the limits of their monetary jurisdiction. For instance, the Office of the Staff Judge Advocate, Fort Riley, Kansas, is responsible for claims, within its monetary jurisdiction, arising in the geographical area consisting of the states of Nebraska, North Dakota, and South Dakota, and half the state of Kansas. Although the USARCS Commander can assign claims responsibilities for geographical areas, he or she cannot assign personnel authorizations to provide the manpower to do the work. Tables of organization and equipment (TOE) and tables of distribution and allowances (TDA) are controlled at the major command (MACOM) level. The USARCS Commander cannot establish an authorized position on any TOE or TDA. This factor is important and should be considered by any office being affected by a BRAC. Any staff judge advocate office that is asked or directed to assume the claims mission presently performed by another office should coordinate through its MACOM to ensure the transfer from the closing office of the personnel authorizations required to accomplish the mission.

Base realignment and closure is affecting the claims mission at various installations throughout CONUS. Prior coordination, with plenty of lead time, is critical to prevent the degradation of the claims mission at any specific location or area. All BRAC issues affecting claims operations should be identified and discussed with the USARCS at the earliest possible time. Lieutenant Colonel Cashiola.

Professional Responsibility Notes

OTJAG Standards of Conduct Office

Ethical Awareness

The Standards of Conduct Office normally publishes summaries of ethical inquiries that have been resolved after preliminary screenings. These inquiries, which involve isolated instances of professional impropriety, poor communication, lapses in judgment, and similar minor failings, typically are resolved by counseling, admonition, or reprimand. More serious cases, however, are referred to The Judge Advocate General's Professional Responsibility Committee (PRC).

The following PRC opinion, which applies the Army *Rules of Professional Conduct for Lawyers (Army Rules)*¹ to a case involving a legal assistance attorney's social and sexual relations with domestic relations clients,² is intended to promote an enhanced awareness of professional responsibility issues and to serve as authoritative guidance for Army lawyers. To stress education and to protect privacy, neither the identity of the office, nor the name of the subject, will be published.³ Mr. Eveland.

Professional Responsibility Opinion Number 92-6

*The Judge Advocate General's
Professional Responsibility Committee*

Facts

Captain *F* was serving as a legal assistance attorney in the office of a particular staff judge advocate. According to his personnel records, Captain *F* is unmarried and he has no prior military service or legal experience. After he finished law school, he joined the Army, graduated from the Judge Advocate Officer Basic Course, and accepted his first duty assignment as a legal assistance attorney.

Summary

In his capacity as a legal assistance attorney, Captain *F* met and formed attorney-client relationships with two women, Mrs. *A* and Mrs. *B*. He provided advice concerning their domestic relations problems to both women. Later, after the attorney-client relationships terminated, or at least after Captain *F* reasonably believed they had terminated, he engaged in social relationships with both women, and a sexual relationship with Mrs. *A*.

By his own admission, Captain *F* initiated the social contact with Mrs. *A* by telephone after obtaining her telephone number from her *Legal Assistance Interview Record, DA Form 2465*.

Captain *F* engaged in a social relationship with Mrs. *B* after meeting her at the Officers' Club. By this time, Mrs. *B* had retained a local civilian attorney to represent her in her divorce. Mrs. *B*, separated from her husband, was waiting for a one-year period to pass before obtaining a no-fault divorce. Even though her husband had custody of their son, she hoped to regain custody before the final decree. Captain *F* and Mrs. *B* met during the next three weeks on occasions to dine and attend movies. Captain *F* was aware that Mrs. *B* was involved in a divorce proceeding, yet continued to meet her on these occasions. By Captain *F*'s own admission, he and Mrs. *B* decided not to "do so much together" after this three-week period because Mrs. *B*'s divorce involved a custody issue.

Captain *F* has been issued a memorandum of reprimand, suspended from duties which require client contact, and counseled by his staff judge advocate concerning professional misconduct. Captain *F* also has submitted an unqualified resignation.

Discussion of Allegations

The complaint against Captain *F* originated with a telephone call from Ms. *X* to Major *Z*, Chief, Legal Assistance Division. Ms. *X* related that she was calling out of concern for Captain *F*, whom she described as a current friend and former boyfriend. Ms. *X* said that Captain *F* had told her that he was dating women clients. According to Captain *F*'s admissions, Ms. *X* was upset because, among other things, after he had gotten her pregnant, she terminated the pregnancy with his financial support.

The preliminary screening official (PSO) spoke with Ms. *X* by telephone. Ms. *X* reported that Captain *F* admitted to her that he had had sex with Mrs. *B* and had spent the night at her house. She also reported that he had asked Ms. *X* for advice on how to get back together with Mrs. *B*. The PSO did not prepare any written statement for Ms. *X*'s signature. Ms. *X* did not provide any letters or other writings.

Captain *F* admitted to knowing the first client, Mrs. *A*. He met her in the legal assistance office. Her marital status was

¹ DEP'T OF ARMY, REG. 27-26, LEGAL SERVICES: RULES OF PROFESSIONAL CONDUCT FOR LAWYERS (1 May 1992) [hereinafter AR 27-26].

² See generally ABA Standing Comm. on Ethics and Professional Responsibility, Formal Op. 92-364 (1992) (sexual relations with clients) [hereinafter ABA Formal Op. 92-364].

³ The actual PRC opinion was edited freely to replace real names and specific identifiers with general or fictional ones.

in question because she married her second husband before being lawfully divorced from her first husband. Captain *F* admitted that after she left, he pulled her legal assistance interview record and called her at home. He said that after they talked on the phone for a while, Mrs. *A* asked him to go out with her, and that during their relationship they had sexual intercourse. He specifically denied ever using client cards other than Mrs. *A*'s to obtain a date.

Captain *F*'s roommate, Mr. *R*, said in a sworn statement that Captain *F* had brought Mrs. *B* to the house twice, once with her young son, and that Captain *F* admitted having sex with her. Mr. *R* maintains that after telling Captain *F* that he thought it was improper for a lawyer to date his clients, Captain *F* said it was "no big deal." During this time, Mr. *R* and Captain *F* had a dispute over sharing household bills, and one of Captain *F*'s checks to Mr. *R* was returned by the bank.

Captain *F* also admitted knowing the second client, identifying her as Mrs. *B*, whom he said was married, but legally separated. He claimed that he initially did not enter into an attorney-client relationship, but only answered her questions. He advised her to retain civilian counsel, which she did. He said that they had a social relationship, but that they never had sexual intercourse or slept overnight at one another's house. He then signed an affidavit denying sexual relations with Mrs. *B*.

According to the PSO, Captain *F* and Mrs. *B* were both evasive and gave inconsistent stories about their relationship and communications. The PSO suspected that they were untruthful and that Captain *F* perhaps contacted Mrs. *B* to coordinate stories.

Captain *F* and the PSO went to the legal assistance card file to find both clients' cards. Captain *F*, not finding cards for either woman, stated that the information also was entered into the computer. However, the legal assistance noncommissioned officer was unable to locate information on either woman in the computer.

According to the PSO, Captain *F* called him a short time later with the addresses of the two clients, became defensive when questioned about his earlier claim of ignorance of the addresses, and denied discussing the case with Mrs. *B*.

When the PSO spoke with Mrs. *B* on the phone, he was convinced that she had discussed the allegations with Captain *F*.

The PSO interviewed Mrs. *B* in the presence of female attorney Captain *C*. Captain *C* observed the interview and formed the opinion that Mrs. *B*'s credibility suffered and that she was not completely forthcoming about Captain *F*.

Applicable Law

Standards of Conduct Regulation

Army Regulation 600-50, Standards of Conduct for Department of the Army Personnel AR 600-50^[4] states:

DA personnel will avoid any action, whether or not specifically prohibited by this regulation, that might result in or reasonably be expected to create the appearance of—

(1) Using public office for private gain.

(6) Affecting adversely the confidence of the public in the integrity of the Government.^[5]

AR 600-50 is a punitive regulation,^[6] and therefore punishable under Article 92, Uniform Code of Military Justice.^[7]

Rules of Professional Conduct for Lawyers

Paragraph 1 of *Army Rules*^[8] makes them applicable to all Army lawyers, both civilian and military.

"A lawyer shall not represent a client if the representation of that client may be materially limited . . . by the lawyer's own interests, unless: (1) the lawyer reasonably believes the representation will not be adversely affected; and (2) the client consents after consultation."^[9]

"It is professional misconduct for a lawyer to . . . commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects . . ."^[10]

⁴DEP'T OF ARMY, REG. 600-50, PERSONNEL—GENERAL: STANDARDS OF CONDUCT FOR DEPARTMENT OF THE ARMY PERSONNEL (28 Jan. 1988) (to be superseded in its entirety by DEP'T OF DEFENSE, DIRECTIVE 5500.7-R, STANDARDS OF CONDUCT, upon approval and signature) [hereinafter AR 600-50].

⁵*Id.* para. 1-4f.

⁶*Id.* para. 1-1.

⁷UCMJ art. 92 (1988).

⁸AR 27-26, *supra* note 1, para. 1.

⁹*Id.* rule 1.7(b).

¹⁰*Id.* rule 8.4(b).

Discussion

Although the information provided by the client on the *Legal Assistance Interview Record (DA Form 2465)* was for obtaining legal services, and for no other reason, the facts show that Captain *F* used this information and his position in the legal assistance office to further his social interest. It is noted that Army legal assistance services are available *inter alia* to all active duty members, active duty family members, and, in foreign countries, Department of Defense civilian employees.^[11] It is further noted that these services are provided at no charge, are frequently the beginning of a search for legal assistance, and may be the only United States forces available for help in foreign countries. In addition to providing direct services to individuals, the legal assistance mission impacts upon combat readiness and deployment.^[12] Thus, those actions which cause either individuals or commanders to question the integrity and confidentiality of the program are detrimental on a wide range. The use of client information to initiate a social relationship is such an action. That action violates subparagraphs 1-4f(1) and (6) of *AR 600-50*^[13].

Findings

The PRC finds that Captain *F* violated paragraphs 1-4f(1) and (6) of *AR 600-50*. However, in view of the facts of this case, and his inexperience, the PRC does not believe that his conduct constitutes a violation of Army Rule 8.4(b). This particular violation of *AR 600-50* simply does not rise to the level of criminal misconduct contemplated in Army Rule 8.4(b).

The PRC also finds that Captain *F* did not violate Army Rule 1.7(b) since, at the time of his personal involvement with Mrs. *A* and Mrs. *B*, there was no longer an attorney-client relationship.

The inquiry contains no statements from Mrs. *A*. Therefore, the PRC accepts as true Captain *F*'s statement that Mrs. *A*'s second marriage, because it was bigamous, was void. Based on this presumption, Captain *F* did not commit adultery with Mrs. *A* because she was not married at the time.

Captain *F* might have impermissibly put his personal interests ahead of his former clients' interests by having improper relations with them. However, in this case, the PRC adopts the attorney's assertion that the attorney-client relationships had terminated by the time he became personally involved. Because the expectations were that Captain *F*'s representation

was not ongoing and had ceased by the time the personal relationships were developing, the PRC finds no other rule violations. The legal assistance consultations were of a limited nature, with no expectations that Captain *F* would either conduct negotiations or appear in court. Nonetheless, viewing events in the light most favorable to Captain *F*, it was still extremely poor judgment for him to pursue these personal relationships. As a lawyer, he should have known that his conduct could complicate the former clients' domestic relations matters or reduce the likelihood of reconciliation.

Additionally, the PSO noted that there is "evidence" that Captain *F* attempted to obstruct the screening inquiry and lied under oath. The members of the committee reviewed the evidence provided for them in evaluating whether they could make a finding regarding these allegations. After reviewing the evidence, the members of the committee were not convinced that the evidence supported a finding adverse to Captain *F*. Therefore, the committee finds evidence lacking to conclude that Captain *F* attempted to obstruct the inquiry by removing client cards or computer records, by conspiring with Mrs. *B* to cover up a sexual relationship, or by lying under oath.

Recommendations

a. In light of the above findings, the committee recommends that The Judge Advocate General issue a formal memorandum of reprimand, to be filed in Captain *F*'s official military personnel file. The memorandum should be for violating *AR 600-50*. The memorandum should address Captain *F*'s conduct in using the *Legal Assistance Interview Record, DA Form 2465*, for his own personal use, thus adversely affecting public confidence in the integrity of the post legal assistance program. He also should be reprimanded for demonstrating extremely poor judgment in pursuing personal relationships with former clients with unresolved domestic legal problems.

b. The committee further recommends that the program of instruction for Basic Course officers include instruction on the dangers of engaging in social relationships with clients or former clients.

c. Because the current Army Rules are silent, the committee also recommends that The Judge Advocate General consider developing an Army Rule addressing the issue of attorney-client "dating" relationships.^[14]

¹¹ DEP'T OF ARMY, REG. 27-3, LEGAL SERVICES: LEGAL ASSISTANCE, para. 2.4 (10 Mar. 1989) [hereinafter *AR 27-3*] was controlling at the time of the investigation of these allegations. On 30 October 1992, *AR 27-3* was revised extensively and republished.

¹² *Id.* para. 4-5.

¹³ *AR 600-50*, *supra* note 4, para. 1-4f(1), (6).

¹⁴ *Cf.* ABA Formal Op. 92-364, *supra* note 2.

Notes from the Field

Are Military Clauses Necessary or Is State Law Good Enough?

Depending on state law, including a clause that contains an early termination provision for military personnel in a lease may be ill advised based on the availability of state-provided protections. This issue can be illustrated by examining landlord-tenant law in the Commonwealth of Virginia. Even prior to its 1988 revision, the Code of Virginia provisions on leases generally were pro-military. Since the revision, however, the law is even more decidedly pro-military, and leaves little room for improvement.

The applicable section, Va. Code Ann. § 55-248.21:1 (Michie 1988), reads, in pertinent part, as follows:

Any member of the armed forces of the United States . . . may, through the procedure detailed in subsection B of this section, terminate his [or her] rental agreement with the landlord if the member (i) has received permanent change of station orders to depart thirty-five miles or more (radius) from the location of the dwelling unit;

(ii) has received temporary duty orders in excess of three months' duration to depart thirty-five miles or more (radius) from the location of the dwelling unit;

(iii) is discharged or released from active duty . . . ; or

(iv) is ordered to report to government supplied quarters resulting in the forfeiture of basic allowance for quarters.

Virginia law addresses early termination of service, permanent change of station, and moving into quarters; it also addresses the newer issues of terminating active duty because of a selective early retirement board, voluntary separation

incentive, or special separation benefit. Virginia law addresses the aforementioned issues favorably for the service member. If, however, a well meaning legal assistance office uses a standard lease that contains a military clause offering *less* protection than the state statute, the terms of the lease, and not the statute, would apply.

Accordingly, clients should be advised that, depending on state law, the client may benefit by not including a military clause. Many who insisted on having military clauses incorporated in their leases later are shocked to learn that their landlords complied because these clauses severely curtailed coverage the service members otherwise would have received under local laws had the issues not been addressed in the leases.

In an attempt to assist clients who insist on putting a military clause in their leases, one approach would be to type the statutory provision verbatim in the sample lease. Accordingly, any statutory revision that curtails a service member's rights will not apply during the lease term. The client should be informed, however, that by locking into the current provision, any subsequent revision of state law more favorable to the service member would not apply.

The legal assistance attorney may find difficulty in convincing a client to accept a lease that fails to address an issue that the client believes needs to be included in writing. The legal assistance attorney should inform the client that, because of favorable state law, a tenant often benefits by having nothing in the lease specifically address early termination based on military considerations and to let the state law apply.

Legal assistance attorneys also should review periodically their standard leases to ensure that the provisions are not more restrictive than state law requires. Such reviews should extend to all provisions—such as notice and damages—and not simply the military clause. Captain Tempesta.

CLE News

1. Resident Course Quotas

Attendance at resident CLE courses at The Judge Advocate General's School (TJAGSA) is restricted to those who have been allocated student quotas. Quotas for TJAGSA CLE

courses are managed by means of the Army Training Requirements and Resources System (ATRRS), the Army-wide automated quota management system. The ATRRS school code for TJAGSA is 181. **If you do not have a confirmed quota in ATRRS, you do not have a quota for a TJAGSA CLE**

course. Active duty service members must obtain quotas through their directorates of training or through equivalent agencies. Reservists must obtain quotas through their unit training offices or, if they are nonunit reservists, through ARPERCEN, ATTN: DARP-OPS-JA, 9700 Page Boulevard, St. Louis, MO 63132-5200. Army National Guard personnel request quotas through their unit training offices. To verify a quota, ask your training office to provide you with a screen print of the ATRRS R1 screen showing by-name reservations.

2. TJAGSA CLE Course Schedule

1993

2 August 1993-13 May 1994: 42d Graduate Course (5-27-C22).

2-6 August: 54th Law of War Workshop (5F-F42).

9-13 August: 17th Criminal Law New Developments Course (5F-F35).

16-20 August: 11th Federal Litigation Course (5F-F29) (formally conducted in October/November).

16-20 August: 4th Senior Legal NCO Management Course (512-71D/E/40/50).

23-27 August: 119th Senior Officer Legal Orientation Course (5F-F1).

30 August-3 September: 16th Operational Law Seminar (5F-F47).

20-24 September: 10th Contract Claims, Litigation, and Remedies Course (5F-F13).

3. Civilian Sponsored CLE Courses

October 1993

1-2: LSU, Divorce Law Practice for the Louisiana Attorney, Baton Rouge, LA.

3-6: NCD, 3d Annual National Conference on Domestic Violence, San Diego, CA.

4-5: ESI, Electronic Commerce, Washington, D.C.

4-8: GWU, Administration of Government Contracts, Washington, D.C.

4-8: SLF, Antitrust Law Short Course, Dallas, TX.

6-8: GWU, ADP/Telecommunications Contract Law, Washington, D.C.

7-8: NWU, 32d Annual Corporate Counsel Institute, Chicago, IL.

7-8: NELI, 1994 Affirmative Action Briefing, Seattle, WA.

8-9: LSU, Evidence, Baton Rouge, LA.

10-13: NCD, Evidence for Prosecutors, Reno, NV.

10-14: NCD, Prosecuting Drug Cases, New Orleans, LA.

11-14: NCD, Second Annual National Conference on Domestic Violence, Williamsburg, VA.

14-15: GWU, Procurement Law Research Workshop, Washington, D.C.

14-15: NELI, 1994 Affirmative Action Briefing, San Francisco, CA.

14-15: SLF, Labor Law Institute, Dallas, TX.

14-15: LSU, 1993 Recent Developments in Legislation and Jurisprudence, Monroe, LA.

14-15: TPI, Environmental Law & Litigation, New York, NY.

15: ESI, The New Cost Accounting Standards, Washington, D.C.

17-21: NCD, Prosecuting Drug Cases, Philadelphia, PA.

18: ESI, Federal Acquisition Regulation (FAR) Update, Washington, D.C.

18-22: GWU, Administration of Government Contracts, San Diego, CA.

19-22: ESI, Competitive Proposals Contracting, Washington, D.C.

20: GWU, Contract Award Protests: GAO, Washington, D.C.

21: GWU, Contract Award Protests: GSBGA, Washington, D.C.

21-22: NELI, 1994 Affirmative Action Briefing, Austin, TX.

21-22: FP, ERISA Claims & Litigation, Los Angeles, CA.

21-22: SULS, Law & Science at the Crossroad Biomedical Technology, Ethics, Boston, MA.

22-23: LSU, 1993 Recent Developments in Legislation and Jurisprudence, Baton Rouge, LA.

24-28: NCD, Special Prosecutions, San Antonio, TX.

25: ESI, Federal Information Processing (FIP) Acquisition Update, Washington, D.C.

25: TPI, Superfund and Superfund Litigation, Philadelphia, PA.

25-29: GWU, Government Contract Law, Washington, D.C.

26-29: ESI, Small Purchases, Washington, D.C.

28-29: GWU, Mergers and Acquisitions for Government Contractors, Washington, D.C.

28-29: NELI, 1994 Affirmative Action Briefing, Chicago, IL.

29-30: LSU, 23d Annual Estate Planning Seminar, Baton Rouge, LA.

For further information on civilian courses, please contact the institution offering the course. The addresses are listed in the March 1993 issue of *The Army Lawyer*.

4. Mandatory Continuing Legal Education Jurisdictions and Reporting Dates

Thirty-eight states currently have a mandatory continuing legal education (CLE) requirement.

In these MCLE states, all active attorneys are required to attend approved continuing legal education programs for a specified number of hours each year or over a period of years. Additionally, bar members are required to report periodically either their compliance or reason for exemption from compliance. Due to the varied MCLE programs, JAGC Personnel Policies, para. 7-11c (Oct. 1988) provides that staying abreast of state bar requirements is the responsibility of the individual judge advocate. State bar membership requirements and the availability of exemptions or waivers of MCLE for military personnel vary from jurisdiction to jurisdiction and are subject to change. TJAGSA *resident* CLE courses have been approved by most of these MCLE jurisdictions.

Listed below are those jurisdictions in which some form of mandatory continuing legal education has been adopted with a brief description of the requirement, the address of the local official, and the reporting date. The "*" indicates that TJAGSA *resident* CLE courses have been approved by the state.

<u>State</u>	<u>Local Official</u>	<u>CLE Requirements</u>
Alabama*	MCLE Commission Alabama State Bar 415 Dexter Ave. Montgomery, AL 36104 205-269-1515	-Twelve hours per year. -Active duty military attorneys are exempt but must declare exemption. -Reporting date: 31 December.

<u>State</u>	<u>Local Official</u>	<u>CLE Requirements</u>
Arizona*	Director, Programs and Public Services Division 363 North First Ave. Phoenix, AZ 85003 602-252-4804	-Fifteen hours each year including two hours professional responsibility. -Reporting date: 15 July.
Arkansas*	Director of Professional Programs 1501 N. University #311 Little Rock, AR 72207 501-664-8737	-Twelve hours per year. -Reporting date: 30 June.
California*	State Bar of California 100 Van Ness 28th Floor San Francisco, CA 94102 415-241-2100	-Thirty-six hours every thirty-six months. Eight hours must be on legal ethics and/or law practice management, with at least four hours in legal ethics, one hour of substance abuse and emotional distress, and one hour on the elimination of bias. -Attorneys employed by the Federal Government are exempt. -Reporting date: 1 February
Colorado*	CLE Dominion Plaza Building 600 17th St. Suite 520-S Denver, CO 80202 303-893-8094	-Forty-five hours, including two hours of legal ethics during three-year period. -Newly admitted attorneys must also complete fifteen hours in basic legal and trial skills within three years. -Reporting date: Anytime within three-year period.
Delaware*	Commission on CLE 831 Tatnall Street Wilmington, DE 19801 302-658-5856	-Thirty hours during two-year period. -Reporting date: 31 July.
Florida*	Director, Legal Specialization & Education The Florida Bar 650 Apalachee Parkway Tallahassee, FL 32399-2300 904-561-5690	-Thirty hours during three-year period, including two hours of legal ethics. -Active duty military are exempt but must declare exemption during reporting period. -Reporting date: Assigned month every three years.

<u>State</u>	<u>Local Official</u>	<u>CLE Requirements</u>	<u>State</u>	<u>Local Official</u>	<u>CLE Requirements</u>
Georgia*	Georgia Commission on Continuing Lawyer Competency 800 The Hurt Building 50 Hurt Plaza Atlanta, GA 30303 404-527-8710	-Twelve hours per year, including one hour legal ethics, one hour professionalism and three hours trial practice (trial attorneys only). -Reporting date: 31 January.	Michigan	Executive Director State Bar of Michigan 306 Townsend St. Lansing, MI 48933 517-372-9030	-Thirty or thirty-six hours (depending on whether admitted in first or second half of fiscal year) within three years of becoming active member of bar. Six or twelve hours the first year, twelve hours in the second year and twelve hours in the third year. Courses must be taken in sequence identified by CLE Commission. -Reporting date: 31 March
Idaho*	Deputy Director Idaho State Bar P.O. Box 895 Boise, ID 83701- 0898 208-42-8959	-Thirty hours during three-year period. -Reporting date: Every third year depending on year of admission.	Minnesota*	Director, Minnesota State Board of CLE 1 West Water St., Suite 250 St. Paul, MN 55107 612-297-1800	-Forty-five hours during three-year period. -Reporting date: 30 August.
Indiana*	Indiana Commission for CLE 101 West Ohio Suite 410 Indianapolis, IN 46204 317-232-1943	-Thirty-six hours within a three-year period (minimum six hours per year). -New admittees by examination are given three-year grace period beginning 1 January before admission. -Reporting date: 31 December.	Mississippi*	CLE Administrator Mississippi Commission on CLE P.O. Box 2168 Jackson, MS 39225-2168 601-948-4471	-Twelve hours per year. -Active duty military attorneys are exempt, but must declare exemption. -Reporting date: 31 December. (In the process of changing to 1 August).
Iowa*	Executive Director Commission on CLE State Capitol Des Moines, IA 50319 515-281-3718	-Fifteen hours each year, including two hours of legal ethics during two-year period. -Reporting date: 1 March.	Missouri*	Director of Programs P.O. Box 119 Jefferson City, MO 65102 314-635-4128	-Fifteen hours per year, including three hours legal ethics every three years. -New admittees three hours professionalism, legal/judicial ethics, or malpractice in twelve months. -Reporting date: 31 July.
Kansas*	CLE Commission Kansas Judicial Center 301 West 10th Street Room 23-S Topeka, KS 66612- 1507 913-357-6510	-Twelve hours each year including two hours of ethics. -Reporting date: 1 July.	Montana*	MCLE Administrator Montana Board of CLE P.O. Box 577 Helena, MT 59624 406-442-7660	-Fifteen hours per year. -Reporting date: 1 March.
Kentucky*	CLE Kentucky Bar Association W. Main at Kentucky River Frankfort, KY 40601 502-564-3795	-Fifteen hours per year, including two hours of legal ethics. -Bridge the Gap Training for new attorneys. -Reporting date: June 30.	Nevada*	Executive Director Board of CLE 295 Holcomb Ave. Suite 5-A Reno, NV 89502 702-329-4443	-Ten hours per year. -Reporting date: 1 March.
Louisiana*	CLE Coordinator Louisiana State Bar Association 601 St. Charles Ave. New Orleans, LA 70130 504-566-1600	-Fifteen hours per year, including one hour of legal ethics. -Active duty military are exempt but must declare exemption. -Reporting date: 31 January.			

<u>State</u>	<u>Local Official</u>	<u>CLE Requirements</u>	<u>State</u>	<u>Local Official</u>	<u>CLE Requirements</u>
New Hampshire*	New Hampshire Bar Association 18 Centre Street Concord, NH 03301 (603) 224-6942	-Twelve hours per year, including at least two hours of legal ethics, professionalism or the prevention of malpractice, substance abuse or attorney-client disputes. -Active duty military attorneys are exempt, but must declare their exemptions. -Reporting date: 1 August.	Oklahoma*	MCLE Administrator Oklahoma State Bar P.O. Box 53036 Oklahoma City, OK 73152 405-524-2365	-Twelve hours per year, including one hour of legal ethics. -Active duty military are exempt, but must declare exemption. -Reporting date: 15 February.
New Mexico*	MCLE Administrator P.O. Box 25883 Albuquerque, NM 87125 505-842-6132	-Fifteen hours per year, including one hour of legal ethics. -Reporting date: thirty days after program.	Oregon*	MCLE Administrator Oregon State Bar 5200 SW. Meadows Road P.O. Box 1689 Lake Oswego, OR 97034-0889 503-620-0222-ext. 368	-Forty-five hours during three-year period, including six hours of legal ethics. New admittees—Fifteen hours, ten must be in practical skills and two in ethics. -Reporting date: Initially date of birth; thereafter all reporting periods end every three years except new admittees and reinstated members—an initial one-year period.
North Carolina*	Executive Director The North Carolina State Bar 208 Fayetteville Street Mall P.O. Box 25148 Raleigh, NC 27611 919-733-0123	-Twelve hours per year including two hours of legal ethics. Special three-hour block of ethics once every three years. -New attorneys nine hours practical skills each of first three years of practice. -Armed Service members on full-time active duty exempt, but must declare exemption. -Reporting date: 28 February of succeeding year.	Pennsylvania	Pennsylvania CLE Board c/o Administrative Office of Pennsylvania Courts 5035 Ritter Road Suite 700 Mechanicsburg, PA 17055 717-795-2119	-Five hours per year. -Active attorneys must complete a minimum of five hours on ethics and professionalism each year. Up to ten hours may be carried forward and applied against the minimum requirement for either of the next two succeeding years. -Active duty military attorneys are exempt, but must declare their exemptions. -Reporting date: Annually as assigned
North Dakota*	North Dakota CLE Commission P.O. Box 2136 Bismarck, ND 58502 01-255-1404	-Forty-five hours during three-year period. -Reporting date: period ends 30 June; affidavit must be received by 31 July.			
Ohio*	Secretary of the Supreme Court Commission on CLE 30 East Broad Street Second Floor Columbus, OH 43266-0419 614-644-5470	-Twenty-four hours during two-year period, including two hours of legal ethics or professional responsibility every cycle, including instruction on substance abuse. -Active duty military are exempt, but pay a filing fee. -Reporting date: every two years by 31 January.	South Carolina*	Administrative Director Commission on Continuing Lawyer Competence P.O. Box 2138 Columbia, SC 29202 803-799-5578	-Twelve hours per year, including six hours ethics/professional responsibility every three years in addition to annual MCLE requirement. -Active duty military attorneys are exempt, but must declare exemption. -Reporting date: 15 January.

<u>State</u>	<u>Local Official</u>	<u>CLE Requirements</u>	<u>State</u>	<u>Local Official</u>	<u>CLE Requirements</u>
Tennessee*	Executive Director Commission on CLE 214 2nd Ave. Suite 104 Nashville, TN 37201 615-242-6442	-Twelve hours per year. -Active duty military attorneys are exempt. -Reporting date: 1 March.	Washington*	Executive Secretary Washington State Board of CLE 500 Westin Building 2001 6th Ave. Seattle, WA 98121-2599 206-448-0433	-Fifteen hours per year. -Reporting date: 31 January (May for supplementals with late filing fee; \$50 1st year; \$150 2nd year; \$250 3rd year, etc.).
Texas*	Director of MCLE Texas State Bar Box 12487 Capital Station Austin, TX 78711 512-463-1442	-Fifteen hours per year, including one hour of legal ethics. -Reporting date: Last day of birthmonth yearly.	West Virginia*	MCLE Coordinator West Virginia State Bar State Capitol Charleston, WV 25305 304-348-2456	-Twenty-four hours every two years, at least three hours must be in legal ethics or office management. -Reporting date: 30 June.
Utah*	MCLE Administrator 645 S. 200 E. Salt Lake City, UT 84111-3834 801-531-9077 800-662-9054	-Twenty-four hours during two-year period, plus three hours of legal ethics. -Reporting date: End of two-year period.	Wisconsin*	Director Board of Attorneys Professional Competence 119 Martin Luther King, Jr. Boulevard Room 405 Madison, WI 53703-3355 608-266-9760	-Thirty hours during two-year period. -Reporting date: 20 January every other year.
Vermont*	Directors, MCLE Pavilion Office Building Post Office Montpelier, VT 05602 802-828-3281	-Twenty hours during two-year period, including two hours of legal ethics. -Reporting date: 15 July.	Wyoming*	Wyoming State Bar P.O. Box 109 Cheyenne, WY 82003-0109 307-632-9061	-Fifteen hours per year. -Reporting date: 30 January.
Virginia*	Director of MCLE Virginia State Bar 801 East Main Street 10th Floor Richmond, VA 23219 804-786-5973	-Twelve hours per year including two hours of ethics. -Reporting date: 30 June (annual license renewal).			

Current Material of Interest

1. TJAGSA Materials Available Through Defense Technical Information Center

Each year, TJAGSA publishes deskbooks and materials to support resident instruction. Much of this material is useful to judge advocates and government civilian attorneys who are unable to attend courses in their practice areas. The School receives many requests each year for these materials. Because the distribution of these materials is not within the School's

mission, TJAGSA does not have the resources to provide these publications.

To provide another avenue of availability, some of this material is being made available through the Defense Technical Information Center (DTIC). An office may obtain this material in two ways. The first is through a user library on the installation. Most technical and school libraries are DTIC "users." If they are "school" libraries, they may be free users.

The second way is for the office or organization to become a government user. Government agency users pay five dollars per hard copy for reports of 1-100 pages and seven cents for each additional page over 100, or ninety-five cents per fiche copy. Overseas users may obtain one copy of a report at no charge. The necessary information and forms to become registered as a user may be requested from: Defense Technical Information Center, Cameron Station, Alexandria, VA 22314-6145, telephone: commercial (703) 274-7633, DSN 284-7633.

Once registered, an office or other organization may open a deposit account with the National Technical Information Service to facilitate ordering materials. Information concerning this procedure will be provided when a request for user status is submitted.

Users are provided biweekly and cumulative indices. These indices are classified as a single confidential document and mailed only to those DTIC users whose organizations have a facility clearance. This will not affect the ability of organizations to become DTIC users, nor will it affect the ordering of TJAGSA publications through DTIC. All TJAGSA publications are unclassified and the relevant ordering information, such as DTIC numbers and titles, will be published in *The Army Lawyer*. The following TJAGSA publications are available through DTIC. The nine character identifier beginning with the letters AD are numbers assigned by DTIC and must be used when ordering publications.

Contract Law

- AD A239203 Government Contract Law Deskbook Vol 1 /JA-505-1-91 (332 pgs).
- AD A239204 Government Contract Law Deskbook, Vol 2 /JA-505-2-91 (276 pgs).
- AD B144679 Fiscal Law Course Deskbook/JA-506-90 (270 pgs).

Legal Assistance

- AD B092128 USAREUR Legal Assistance Handbook/ JAGS-ADA-85-5 (315 pgs).
- *AD A263082 Real Property Guide—Legal Assistance/JA-261(93) (293 pgs).
- AD A259516 Legal Assistance Guide: Office Directory/ JA-267(92) (110 pgs).
- AD B164534 Notarial Guide/JA-268(92) (136 pgs).
- AD A228272 Legal Assistance: Preventive Law Series/JA-276-90 (200 pgs).
- AD A246325 Soldiers' and Sailors' Civil Relief Act/JA-260(92) (156 pgs).

- AD A244874 Legal Assistance Wills Guide/JA-262-91 (474 pgs).
- AD A244032 Family Law Guide/JA 263-91 (711 pgs).
- AD A241652 Office Administration Guide/JA 271-91 (222 pgs).
- AD B156056 Legal Assistance: Living Wills Guide/JA-273-91 (171 pgs).
- AD A241255 Model Tax Assistance Guide/JA 275-91 (66 pgs).
- AD A246280 Consumer Law Guide/JA 265-92 (518 pgs).
- AD A259022 Tax Information Series/JA 269(93) (117 pgs).
- AD A256322 Legal Assistance: Deployment Guide/JA-272(92) (364 pgs).
- AD A260219 Air Force All States Income Tax Guide— January 1993

Administrative and Civil Law

- AD A199644 The Staff Judge Advocate Officer Manager's Handbook/ACIL-ST-290.
- AD A258582 Environmental Law Deskbook, JA-234-1(92) (517 pgs).
- AD A255038 Defensive Federal Litigation/JA-200(92) (840 pgs).
- AD A255346 Reports of Survey and Line of Duty Determinations/JA 231-92 (89 pgs).
- AD A255064 Government Information Practices/JA-235(92) (326 pgs).
- AD A259047 AR 15-6 Investigations/JA-281(92) (45 pgs).

Labor Law

- AD A256772 The Law of Federal Employment/JA-210(92) (402 pgs).
- AD A255838 The Law of Federal Labor-Management Relations/JA-211-92 (430 pgs).

Developments, Doctrine, and Literature

- AD A254610 Military Citation, Fifth Edition/JAGS-DD-92 (18 pgs).

Criminal Law

- AD A260531 Crimes and Defenses Deskbook/JA 337(92) (220 pgs).

- AD A260913 Unauthorized Absences/JA 301(92) (86 pgs).
- AD A251120 Criminal Law, Nonjudicial Punishment/JA-330(92) (40 pgs).
- AD A251717 Senior Officers Legal Orientation/JA 320(92) (249 pgs).
- AD A251821 Trial Counsel and Defense Counsel Handbook /JA 310(92) (452 pgs).
- AD A261247 United States Attorney Prosecutions/JA-338(92) (343 pgs).

International Law

- *AD A262925 Operational Law Handbook (Draft)/JA 422(93) (180 pgs).

Reserve Affairs

- AD B136361 Reserve Component JAGC Personnel Policies Handbook/JAGS-GRA-89-1 (188 pgs).

The following CID publication also is available through DTIC:

- AD A145966 USACIDC Pam 195-8, Criminal Investigations, Violation of the USC in Economic Crime Investigations (250 pgs).

Those ordering publications are reminded that they are for government use only.

*Indicates new publication or revised edition.

2. Regulations and Pamphlets

a. *Obtaining Manuals for Courts-Martial, DA Pamphlets, Army Regulations, Field Manuals, and Training Circulars.*

(1) The U.S. Army Publications Distribution Center at Baltimore stocks and distributes DA publications and blank forms that have Army-wide use. Its address is:

Commander
U.S. Army Publications Distribution Center
2800 Eastern Blvd.
Baltimore, MD 21220-2896

(2) Units must have publications accounts to use any part of the publications distribution system. The following extract from *Department of the Army Regulation 25-30, The Army Integrated Publishing and Printing Program*, paragraph 12-7c (28 February 1989) is provided to assist Active, Reserve, and National Guard units.

The units below are authorized publications accounts with the USAPDC.

(1) *Active Army.*

(a) *Units organized under a PAC.* A PAC that supports battalion-size units will request a consolidated publications account for the entire battalion except when subordinate units in the battalion are geographically remote. To establish an account, the PAC will forward a DA Form 12-R (Request for Establishment of a Publications Account) and supporting DA 12-series forms through their DCSIM or DOIM, as appropriate, to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896. The PAC will manage all accounts established for the battalion it supports. (Instructions for the use of DA 12-series forms and a reproducible copy of the forms appear in DA Pam. 25-33.)

(b) *Units not organized under a PAC.* Units that are detachment size and above may have a publications account. To establish an account, these units will submit a DA Form 12-R and supporting DA 12-series forms through their DCSIM or DOIM, as appropriate, to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896.

(c) *Staff sections of FOAs, MACOMs, installations, and combat divisions.* These staff sections may establish a single account for each major staff element. To establish an account, these units will follow the procedure in (b) above.

(2) *ARNG units that are company size to State adjutants general.* To establish an account, these units will submit a DA Form 12-R and supporting DA 12-series forms through their State adjutants general to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896.

(3) *USAR units that are company size and above and staff sections from division level and above.* To establish an account, these units will submit a DA Form 12-R and supporting DA 12-series forms through their supporting installation and CONUSA to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896.

(4) *ROTC elements.* To establish an account, ROTC regions will submit a DA Form 12-R and supporting DA 12-series forms through their supporting installation and TRADOC DCSIM to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896. Senior and junior ROTC units will submit a DA Form 12-R and supporting DA 12-series forms through their supporting installation, regional headquarters, and TRADOC DCSIM to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896.

Units not described in [the paragraphs] above also may be authorized accounts. To establish accounts, these units must send their requests through their DCSIM or DOIM, as appropriate, to Commander, USAPPC, ATTN: ASQZ-NV, Alexandria, VA 22331-0302.

Specific instructions for establishing initial distribution requirements appear in DA Pam. 25-33.

If your unit does not have a copy of DA Pam. 25-33, you may request one by calling the Baltimore USAPDC at (410) 671-4335.

(3) Units that have established initial distribution requirements will receive copies of new, revised, and changed publications as soon as they are printed.

(4) Units that require publications that are not on their initial distribution list can requisition publications using DA Form 4569. All DA Form 4569 requests will be sent to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896. This office may be reached at (410) 671-4335.

(5) Civilians can obtain DA Pams through the National Technical Information Service (NTIS), 5285 Port Royal Road, Springfield, Virginia 22161. They can be reached at (703) 487-4684.

(6) Navy, Air Force, and Marine Corps JAGs can request up to ten copies of DA Pams by writing to U.S. Army Publications Distribution Center, ATTN: DAIM-APC-BD, 2800 Eastern Boulevard, Baltimore, MD 21220-2896. Telephone (410) 671-4335.

b. *Listed below are new publications and changes to existing publications.*

<u>Number</u>	<u>Title</u>	<u>Date</u>
AR 5-14	Management of Contracted Advisory and Assistance Services	15 Jan 93

<u>Number</u>	<u>Title</u>	<u>Date</u>
AR 30-18	Army Troop Issue Subsistence Activity Operating Policies	4 Jan 93
AR 135-156	Military Publications Personnel Management of General Officers, Interim Change 101	1 Feb 93
CIR 11-92-3	Internal Control Review Checklist	31 Oct 92
CIR 608-93-1	The Army Family Action Plan X	15 Jan 93
JFTR	Joint Federal Travel Regulations, Change 75	1 Mar 93
UPDATE 16	Enlisted Ranks Personnel Update Handbook, Change 3	27 Nov 93

3. LAAWS Bulletin Board Service

a. The Legal Automation Army-Wide System (LAAWS) operates an electronic bulletin board (BBS) dedicated to serving the Army legal community and certain approved DOD agencies. The LAAWS BBS is the successor to the OTJAG BBS formerly operated by the OTJAG Information Management Office. Access to the LAAWS BBS currently is restricted to the following individuals:

- 1) Active-duty Army judge advocates;
- 2) Civilian attorneys employed by the Department of the Army;
- 3) Army Reserve and Army National Guard judge advocates on active duty, or employed full time by the federal government;
- 4) Active duty Army legal administrators, noncommissioned officers, and court reporters;
- 5) Civilian legal support staff employed by the Judge Advocate General's Corps, U.S. Army;
- 6) Attorneys (military and civilian) employed by certain supported DOD agencies (e.g., DLA, CHAMPUS, DISA, HQS);
- 7) Individuals with approved, written exceptions to policy.

Requests for exceptions to the access policy should be submitted to the following address:

LAAWS Project Officer
 Attn: LAAWS BBS SYSOPS
 Mail Stop 385, Bldg. 257
 Fort Belvoir, VA 22060-5385

b. Effective 2 November 1992, the LAAWS BBS system was activated at its new location, the LAAWS Project Office at Fort Belvoir, Virginia. In addition to this physical transition, the system has undergone a number of hardware and software upgrades. The system now runs on a 80486 tower, and all lines are capable of operating at speeds up to 9600 baud. While these changes will be transparent to the majority of users, they will increase the efficiency of the BBS, and provide faster access to those with high-speed modems.

c. Numerous TJAGSA publications are available on the LAAWS BBS. Users can sign on by dialing commercial (703) 805-3988, or DSN 655-3988 with the following telecommunications configuration: 9600/2400/1200 baud; parity-none; 8 bits; 1 stop bit; full duplex; Xon/Xoff supported; VT100 or ANSI terminal emulation. Once logged on, the system greets the user with an opening menu. Members need only answer the prompts to call up and download desired publications. The system will ask a new user to answer several questions and tell him or her that access will be granted to the LAAWS BBS after receiving membership confirmation, which takes approximately twenty-four hours. *The Army Lawyer* will publish information on new publications and materials as they become available through the LAAWS BBS.

d. *Instructions for Downloading Files From the LAAWS Bulletin Board Service.*

(1) Log on to the LAAWS BBS using ENABLE and the communications parameters listed in subparagraph c, above.

(2) If you have never downloaded files before, you will need the file decompression utility program that the LAAWS BBS uses to facilitate rapid transfer over the phone lines. This program is known as the PKUNZIP utility. To download it on to your hard drive, take the following actions after logging on:

(a) When the system asks, "Main Board Command?" Join a conference by entering [j].

(b) From the Conference Menu, select the Automation Conference by entering [12] and hit the enter key when ask to view other conference members.

(c) Once you have joined the Automation Conference, enter [d] to Download a file off the Automation Conference menu.

(d) When prompted to select a file name, enter [pkz 110.exe]. This is the PKUNZIP utility file.

(e) If prompted to select a communications protocol, enter [x] for X-modem protocol.

(f) The system will respond by giving you data such as download time and file size. You should then press the F10 key, which will give you a top-line menu. If you are using ENABLE 3.XX from this menu, select [f] for Files, followed

by [r] for Receive, followed by [x] for X-modem protocol. The menu will then ask for a file name. Enter [c:\pkz110.exe].

(g) If you are using ENABLE 4.0 select the PROTOCOL option and select which protocol you wish to use X-modem-checksum. Next select the RECEIVE option and enter the file name "pkz110.exe" at the prompt.

(h) The LAAWS BBS and your computer will take over from here. Downloading the file takes about fifteen to twenty minutes. ENABLE will display information on the progress of the transfer as it occurs. Once the operation is complete the BBS will display the message "File transfer completed.." and information on the file. Your hard drive now will have the compressed version of the decompression program needed to explode files with the ".ZIP" extension.

(i) When the file transfer is complete, enter [a] to Abandon the conference. Then enter [g] for Good-bye to log-off the LAAWS BBS.

(j) To use the decompression program, you will have to decompress, or "explode," the program itself. To accomplish this, boot-up into DOS and enter [pkz110] at the C:\> prompt. The PKUNZIP utility will then execute, converting its files to usable format. When it has completed this process, your hard drive will have the usable, exploded version of the PKUNZIP utility program, as well as all of the compression/decompression utilities used by the LAAWS BBS.

(3) To download a file, after logging on to the LAAWS BBS, take the following steps:

(a) When asked to select a "Main Board Command?" enter [d] to Download a file.

(b) Enter the name of the file you want to download from subparagraph c, below. A listing of available files can be viewed by selecting File Directories from the main menu.

(c) When prompted to select a communications protocol, enter [x] for X-modem (ENABLE) protocol.

(d) After the LAAWS BBS responds with the time and size data, you should press the F10 key, which will give you the ENABLE top-line menu. If you are using ENABLE 3.XX select [f] for Files, followed by [r] for Receive, followed by [x] for X-modem protocol. If you are using ENABLE 4.0 select the PROTOCOL option and select which protocol you wish to use X-modem-checksum. Next select the RECEIVE option.

(e) When asked to enter a file name enter [c:\xxxxx.yyy] where xxxxx.yyy is the name of the file you wish to download.

(f) The computers take over from here. Once the operation is complete the BBS will display the message "File transfer completed.." and information on the file. The file you downloaded will have been saved on your hard drive.

(g) After the file transfer is complete, log off of the LAAWS BBS by entering [g] to say Good-bye.

(4) To use a downloaded file, take the following steps:

(a) If the file was not compressed, you can use it in ENABLE without prior conversion. Select the file as you would any ENABLE word processing file. ENABLE will give you a bottom-line menu containing several other word processing languages. From this menu, select "ASCII." After the document appears, you can process it like any other ENABLE file.

(b) If the file was compressed (having the ".ZIP" extension) you will have to "explode" it before entering the ENABLE program. From the DOS operating system C:\> prompt, enter [pkunzip{space}xxxxx.zip] (where "xxxxx.zip" signifies the name of the file you downloaded from the LAAWS BBS). The PKUNZIP utility will explode the compressed file and make a new file with the same name, but with a new ".DOC" extension. Now enter ENABLE and call up the exploded file "XXXXXX.DOC", by following instructions in paragraph (4)(a), above.

e. *TJAGSA Publications Available Through the LAAWS BBS.* The following is a current list of TJAGSA publications available for downloading from the LAAWS BBS (Note that the date UPLOADED is the month and year the file was made available on the BBS; publication date is available within each publication):

<u>FILE NAME</u>	<u>UPLOADED</u>	<u>DESCRIPTION</u>
1990_YIR.ZIP	January 1991	1990 Contract Law Year in Review in ASCII format. It was originally provided at the 1991 Government Contract Law Symposium at TJAGSA.
1991_YIR.ZIP	January 1992	TJAGSA Contract Law 1991 Year in Review Article.
505-1.ZIP	June 1992	Volume 1 of the May 1992 Contract Attorneys Course Deskbook.
505-2.ZIP	June 1992	Volume 2 of the May 1992 Contract Attorneys Course Deskbook.
506.ZIP	November 1991	TJAGSA Fiscal Law Deskbook, Nov. 1991.
93CLASS.ASC	July 1992	FY TJAGSA Class Schedule; ASCII.
93CLASS.EN	July 1992	FY TJAGSA Class Schedule; ENABLE 2.15.

<u>FILE NAME</u>	<u>UPLOADED</u>	<u>DESCRIPTION</u>
93CRS.ASC	July 1992	FY TJAGSA Course Schedule; ASCII.
93CRS.EN	July 1992	FY TJAGSA Course Schedule; ENABLE 2.15.
ALAW.ZIP	June 1990	<i>The Army Lawyer/ Military Law Review Database (Enable 2.15).</i> Updated through 1989 Army Lawyer Index. It includes a menu system and an explanatory memorandum, ARLAWMEM.WPF.
CCLR.ZIP	September 1990	Contract Claims, Litigation, Litigation & Remedies
FISCALBK.ZIP	November 1990	The November 1990 Fiscal Law Deskbook
FSO_201.ZIP	October 1992	Update of FSO Automation Program
JA200A.ZIP	August 1992	Defensive Federal Litigation, Part A, Aug. 92
JA200B.ZIP	August 1992	Defensive Federal Litigation, Part B, Aug. 92
JA210.ZIP	October 1992	Law of Federal Employment, Oct. 92
JA211.ZIP	August 1992	Law of Federal Labor-Management Relations, July 92
JA231.ZIP	October 1992	Reports of Survey and Line of Duty Determinations—Programmed Instruction
JA235-92.ZIP	August 1992	Government Information Practices, July 92. Updates JA235.ZIP.
JA235.ZIP	March 1992	Government Information Practices
JA241.ZIP	March 1992	Federal Tort Claims Act
JA260.ZIP	October 1992	Soldiers' and Sailors' Civil Relief Act Update, Sept. 92
JA261.ZIP	March 1992	Legal Assistance Real Property Guide
JA262.ZIP	March 1992	Legal Assistance Wills Guide

<u>FILE NAME</u>	<u>UPLOADED</u>	<u>DESCRIPTION</u>	<u>FILE NAME</u>	<u>UPLOADED</u>	<u>DESCRIPTION</u>
JA267.ZIP	March 1992	Legal Assistance Office Directory	JA509.ZIP	Oct 1992	TJAGSA Deskbook from the 9th Contract Claims, Litigation, & Remedies Course held Sept. 92
JA268.ZIP	March 1992	Legal Assistance Notarial Guide	JAGSCHL.ZIP	Mar 1992	JAG School Report to DSAT
JA269.ZIP	March 1992	Federal Tax Information Series	ND-BBS.ZIP	July 1992	TJAGSA Criminal Law New Developments Course Deskbook. Aug. 92
JA271.ZIP	March 1992	Legal Assistance Office Administration Guide	V1YIR91.ZIP	January 1992	Section 1 of the TJAGSA's Annual Year in Review for CY 1991 as presented at the Jan 92 Contract Law Symposium
JA272.ZIP	March 1992	Legal Assistance Deployment Guide.	V2YIR91.ZIP	January 1992	Volume 2 of TJAGSA's Annual Review of Contract and Fiscal Law for CY 1991
JA274.ZIP	March 1992	Uniformed Services Former Spouses' Protection Act—Outline and References	V3YIR91.ZIP	January 1992	Volume 3 of TJAGSA's Annual Review of Contract and Fiscal Law for CY 1991
JA275.ZIP	March 1992	Model Tax Assistance Program	YIR89.ZIP	January 1990	Contract Law Year in Review—1989
JA276.ZIP	March 1992	Preventive Law Series			
JA281.ZIP	March 1992	AR 15-6 Investigations			
JA285.ZIP	March 1992	Senior Officers' Legal Orientation			
JA285A.ZIP	March 1992	Senior Officers' Legal Orientation Part 1/2			
JA285B.ZIP	March 1992	Senior Officers' Legal Orientation Part 2/2			
JA290.ZIP	March 1992	SJA Office Manager's Handbook			
JA301.ZIP	July 1991	Unauthorized Absence—Programmed Text, July 92			
JA310.ZIP	July 1992	Trial Counsel and Defense Counsel Handbook, July 1992			
JA320.ZIP	July 1992	Senior Officers' Legal Orientation Criminal Law Text, May 92			
JA330.ZIP	July 1992	Nonjudicial Punishment—Programmed Text, Mar. 92			
JA337.ZIP	July 1992	Crimes and Defenses Deskbook, July 92			
JA4221.ZIP	May 1992	Operational Law Handbook, Disk 1 of 2			
JA4222.ZIP	May 1992	Operational Law Handbook, Disk 2 of 2			

f. Reserve and National Guard organizations without organic computer telecommunications capabilities, and individual mobilization augmentees (IMA) having bona fide military needs for these publications, may request computer diskettes containing the publications listed above from the appropriate proponent academic division (Administrative and Civil Law; Criminal Law; Contract Law; International Law; or Developments, Doctrine, and Literature) at The Judge Advocate General's School, Charlottesville, VA 22903-1781. Requests must be accompanied by one 5 1/4-inch or 3 1/2-inch blank, formatted diskette for each file. In addition, a request from an IMA must contain a statement which verifies that he or she needs the requested publications for purposes related to his or her military practice of law.

g. Questions or suggestions concerning the availability of TJAGSA publications on the LAAWS BBS should be sent to The Judge Advocate General's School, Literature and Publications Office, ATTN: JAGS-DDL, Charlottesville, VA 22903-1781. For additional information concerning the LAAWS BBS, contact the System Operator, Sergeant First Class Tim Nugent, commercial (703) 805-2922, DSN 655-2922, or at the address in paragraph a, above.

4. TJAGSA Information Management Items

a. Each member of the staff and faculty at The Judge Advocate General's School (TJAGSA) has access to the

Defense Data Network (DDN) for electronic mail (e-mail). To pass information to someone at TJAGSA, or to obtain an e-mail address for someone at TJAGSA, a DDN user should send an e-mail message to:

“postmaster@jags2.jag.virginia.edu”

b. Personnel desiring to reach someone at TJAGSA via DSN should dial 934-7115 to get the TJAGSA receptionist; then ask for the extension of the office you wish to reach.

c. The Judge Advocate General's School also has a toll-free telephone number. To call TJAGSA, dial 1-800-552-3978.

5. The Army Law Library System

a. With the closure and realignment of many Army installations, the Army Law Library System (ALLS) has become the point of contact for redistribution of materials contained in law libraries on those installations. *The Army Lawyer* will continue to publish lists of law library materials made available as a result of base closures. Law librarians having

resources available for redistribution should contact Ms. Helena Daidone, JALS-DDS, The Judge Advocate General's School, U.S. Army, Charlottesville, VA 22903-1781. Telephone numbers are DSN 274-7115, ext. 394, commercial (804) 972-6394, or facsimile (804) 972-6386.

b. The following materials have been declared excess and are available for redistribution. Please contact the library directly at the address provided below:

Linda Roberts, Law Librarian, Office of Counsel, AAFES, P.O. Box 660202, Dallas, Texas 75222; DSN 967-3642

Federal Reporters, vols. 1-300

c. Library Administrators. The Army Law Library Service (ALLS) seeks to use electronic mail (e-mail) more effectively for its reports and correspondence. The Army Law Library service asks library administrators to send their current defense data network (DDN) addresses to Mrs. Helena Daidone, DDN address: daidone@jags2.jag.virginia.edu. E-mail responses are encouraged.